Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

FRANK ACIERNO,

Petitioner,

v.

SAMUEL SKINNER, individually and in his capacity as Secretary, U.S. Department of Transportation; JOHN DAVIS, INDIVIDUALLY and in his capacity as Director of the Highway Division, Delaware Department of Transportation; MANUEL MARKS, individually and in his capacity as Division Administrator, Federal Highway Administration; THOMAS D. LARSON, individually and in his capacity as Federal Highway Administrator; RONALD CARMICHAEL, individually and as 4(f) delegee, Federal Highway Administration Intervenor, ALBERT H. MARTA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Where serious environmental harm is avoidable by using alternatives, and there has been no environmental impact statement, is laches a sufficient basis to deny relief?

2. Is it a clear abuse of judicial discretion to grant summary judgment after denying discovery coupled with judicial impropriety and substantial injustice by a judge with a non disclosed affinity and former employment relationship, and collegial action to deny a disinterested hearing?

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No._____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

FRANK ACIERNO,

Petitioner,

v.

SAMUEL SKINNER, individually and in his capacity as Secretary, U.S. Department of Transportation; JOHN DAVIS, INDIVIDUALLY and in his capacity as Director of the Highway Division, Delaware Department of Transportation; MANUEL MARKS, individually and in his capacity as Division Administrator, Federal Highway Administration; THOMAS D. LARSON, individually and in his capacity as Federal Highway Administrator; RONALD CARMICHAEL, individually and as 4(f) delegee, Federal Highway Administration Intervenor, ALBERT H. MARTA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, Frank Acierno, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on February 28, 1991 (timely motion for rehearing en banc denied on March 29, 1991, two judges noting their disagreement).

OPINIONS BELOW

The judgment order of the Court of Appeals, without opinion, is unreported and appears in the Appendix hereto. The Order and Opinion of the District Court for the District of Delaware barring and dismissing petitioner's claims are unreported and appear in the Appendix. The orders of the district court thrice modifying its judgment orders are unreported and appear in the Appendix. (Citations to the Appendix are made thus: App. 1, etc.)

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on February 28, 1991, and a timely petition for rehearing en banc was denied on March 29, 1991, Chief Judge Sloviter and Judge Mansman voting to require an answer. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Federal Highway Act, 23 U.S.C. § 138 (reproduced verbatim at App. A-37).

National Environmental Policy Act, 42 U.S.C. § 4321, *et seq.* (pertinent text reproduced at App. A-57).

STATEMENT OF THE CASE

Petitioner Frank Acierno sought to prevent construction of a major new highway segment through historic Lewden Greene Park and the Christiana River wetlands, where no environmental impact statement was prepared and no showing of lack of alternatives was made. The Delaware Department of Transportation (hereinafter "DelDOT") needed to utilize petitioner's land in the construction of new Route 7. In order to procure the use with minimal cost, DelDOT attempted to "trade" petitioner the rezoning he desired in return for

use of the required land. DelDOT formally announced it would prepare an environmental impact statement. It later retracted this public commitment by Federal Register notice, without any actual notice. After pressuring Mr. Acierno into preliminary agreements in 1982, DelDOT assured him the right to approve the final design. (R. 382a). Mr. Acierno believed his desire to preserve the park was being communicated to DelDOT and that he could depend on the agency to carry out a thorough investigation of potential environmental impacts. (R373a, 635a). However, the final plans were endlessly delayed and the environment was endangered by the time DelDOT showed petitioner the altered plans and claimed he was bound by them.

Realizing that both he and the relevant environmental statutes had been subverted, petitioner brought suit in March of 1990, prior to the opening of bids for the segment passing through the Park and wetlands. The threatened parkland includes wetlands, which would be better protected by an alternate alignment rejected by DelDOT. (R. 379a). The area is also part of the "Christiana River Trail," an "important colonial barge system," which would have been protected by the alternate alignment. (R. 379a-380a). In sum, DelDOT's "preferred alignment" will adversely affect wetlands, flood plains, and parklands which would not be endangered by the "alternate alignment." (R. 685a). While by 1984, without any announcement of the change, DelDOT had abandoned its environmental impact statement commitment and produced a finding of no significant impact, the agency continually assured Mr. Acierno that his concerns would be addressed. While petitioner relied on his right of final approval and Lewden Greene Park relied on the requirements of the National Environmental Policy Act and the Department of Transportation Act, DelDOT and the other respondents planned a highway which would betray them both in favor of serving a huge commercial project – the Christiana Mall.

REASONS FOR GRANTING THE WRIT

I. DISMISSING ENVIRONMENTAL SUITS BASED ON LACHES UNDERMINES NATIONAL POLICY, AS THE VARIOUS CIRCUITS RECOGNIZE WITHOUT CONSENSUS ON AN APPROPRIATE RESPONSE, REQUIRING THIS COURT'S DEFINITIVE STATEMENT.

The National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321, *et seq.,* states as its purpose "attain[ing] the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences" and "preserv[ing] important historic, cultural, and natural aspects of our national heritage." Accordingly, it requires comprehensive consideration of the potential impacts of any "major federal action . . . significantly affecting the quality of the human environment," by preparing an environmental impact statement ("EIS"), and providing for agency and public comment before finalizing the statement. The respondents recognized that their action required an EIS, and so announced generally and publicly. But, after a decision to place the highway on an expedited program, they chose not to expend the time and resources involved in an EIS, while still routing their highway through an environmentally sensitive and historically important area. For this reason, various responsible agencies received the opportunity to protest the wetland destruction only after the decision had been made.

Section 4(f) of the Department of Transportation Act ("Section 4(f)"), 23 U.S.C. § 138, requires that a transportation program avoid using publicly owned lands or parks unless "there is no prudent and feasible alternative" and there is "all possible planning to minimize harm to the park." The respondents chose to reject an alternative route which avoided the park due to fear of a $5 million increased cost. The cost differential is trivial

under the standard set out by this Court in *Citizens To Preserve Overton Park v. Volpe,* 401 U.S. 402, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971). *Overton Park* holds that, given Congress' finding "that the protection of parkland was to be given paramount importance," alternatives can be disregarded only if they present "unique problems." DelDOT's budgetary concerns were far from unique and cannot justify the sacrifice of parklands and wetlands. In addition, the later added cost of mitigation for the destroyed wetlands, plus the likely cost of compensating petitioner for his land, have now eliminated the cost differential.

In making their decisions under these acts, respondents ignored the existence of Lewden Greene's wetlands by using an out-of-date and overly narrow definition and avoiding agency comment by not doing the EIS. (R. 377a-378a). When they finally disclosed the wetland impact of the the chosen alternative, opposition based on the wetlands destruction was expressed by the U.S. Coast Guard (R. 529a), the U.S. Army Corps of Engineers (R. 540a-542a), the U.S. Department of the Interior, U.S. Fish and Wildlife Service (R. 542a), the Federal Emergency Management Agency (R. 542a), the Delaware Division of Environmental Control, Wetlands Section (R. 546a), the Delaware Division of Fish and Wildlife (R. 546a), and the New Castle Conservation District (R. 548a-549a). Yet, the respondents still deemed an EIS and serious consideration of a different route unnecessary. Instead they agreed to spend some $5 million to partially bridge the wetlands.

Petitioner's suit challenging respondents' environmentally irresponsible construction project was dismissed based on laches. The various circuits recognize the need to weight the national environmental policies heavily against laches defenses. *See,* e.g., *Park County Resource Council, Inc. v. United States Dept. of Agriculture,* 817 F.2d 609 (10th Cir. 1987); *Riverdale Environmental Action Committee Along the Hudson-REACH v. Metropolitan Transp. Authority,* 638 F. Supp. 99

(S.D.N.Y.), *aff'd per curiam* 797 F.2d 110 (2d Cir. 1986); *City of Davis v. Coleman,* 521 F.2d 661 (9th Cir. 1975), *Ecology Center of Louisiana, Inc. v. Coleman,* 515 F. 2d 860 (5th Cir. 1975). The Third Circuit has sustained the public importance of protecting the environment. *Shiffler v. Schlesinger,* 548 F.2d 96 (3d Cir. 1977). However, the Third Circuit does not definitively deny laches as a defense; while the Sixth Circuit holds laches as "disfavored." *Environmental Defense Fund v. Tennessee Valley Authority,* 468 F.2d 1164 (6th Cir. 1972), *cert. denied* 414 U.S. 1036, 94 S.Ct. 534, 38 L.Ed.2d 327 (1973).

This is particularly true where, as here, the agency contributes to the delay by not complying with the nondiscriminatory duty to prepare an environmental impact statement. *Aberdeen & Rockfish R. Co. v. Students Challenging Regulatory Agency Procedures (SCRAP II),* 422 U.S. 289, 95 S.Ct. 2336, 45 L.Ed.2d 191 (1975).

The absence of a clear directive from this Court disfavoring or disqualifying laches as a defense to environmental suits permits flagrant disregard of our national policy supporting environmental protection. As in petitioner's case, violators of statutory requirements and purposes are rewarded for failing to investigate methods of avoiding the destruction of environmental and historical resources. Allowing a defense of laches to parties ignoring environmentally protective requirements encourages such parties to delay taking the appropriate actions and attempt to conceal the dangers to the environment, as did respondents (discussed in detail below).

In addition, the affirmative defense of laches focuses the inquiry and blame for environmental damage to the party who "blows the whistle," and away from the party who necessitated the conflict. In this case, the issue was erroneously focused on petitioner's motives, and petitioner was mischaracterized as unconcerned with the environment and overly concerned with his business.

Mr. Acierno expressed his concern for the "ecological impact" on the park during initial negotiations with DelDOT (R. 290a) and conditioned any agreement on his approval of the construction design. (R. 27a). As a result, petitioner did not raise any initial objections to the project, believing he and DelDOT could negotiate a mutually beneficial and environmentally sound project design (R. 382-3a to 382-4a). Petitioner's reliance on DelDOT was justified by the agency's self-proclaimed undertaking of an EIS. (R. 635a, 637a, 644a). This commitment was later ignored and no sufficiently thorough evaluation was carried out.

Now, lacking direction on the appropriate role of laches in an environmental case, the courts may, albeit unintentionally, reward concealment of environmentally harmful activity and permit evasion of congressionally-endorsed precautions and regulations. This Court should direct the circuit and district courts to fully embrace the policies of environmental protection they already weigh against laches, and strongly discourage such defenses. In order to protect the environment, the courts must be allowed to focus on those who would do it harm.

II. THE JUDGMENT BASED ON LACHES WAS A RADICAL DEPARTURE FROM THE ACCEPTED PRECEDENT OF THE CIRCUITS AND REQUIRES THIS COURT'S CORRECTION.

The hasty disposition of appellant's environmental challenge directly and inexplicably contraverts the holding of the Third Circuit (and other courts) advocating cautious and infrequent use of the laches doctrine where inadequate environmentally-oriented procedures are involved. Further, it contraverts the purposes of NEPA. The Third Circuit, in *Shiffler v. Schlesinger,* 548 F.2d 96 (1977), held:

> The equitable concept of estoppel in the doctrine of laches, that one who has sat on his rights to the

> prejudice of defendant should not be afforded equitable relief, has little applicability in this context for two reasons. Because plaintiffs seek vindication of congressional policies aimed at benefitting the public generally rather than any particular individual, the public at large will suffer when meritorious environmental challenges are foreclosed. Moreover, the primary obligation for full compliance with NEPA rests with the agency, and the agency which has failed to heed the congressional mandate is in an awkward position to argue that tardiness should bar relief which in any event should have been unnecessary. *See generally Minnesota Public Interest Research Group v. Butz,* 498 F.2d 1314, 1324 (8th Cir. 1974) (en banc); *Environmental Defense Fund v. Tennessee Valley Authority,* 468 F.2d 1164, 1182-83 (6th Cir. 1972).

This view accords the proper weight to congressional intent. Thus, even when a project has progressed considerably, the chance for public environmental benefit mandates consideration of the merits of a case, and counsels strongly against the laches defense. *See,* e.g., *Arlington Coalition on Transportation v. Volpe,* 458 F.2d 1323 (4th Cir. 1972); *Coalition for Canyon Preservation v. Bowers,* 632 F.2d 774 (9th Cir. 1980); *Ecology Center of Louisiana, Inc. v. Coleman,* 515 F.2d 860 (5th Cir. 1975).

The district court acknowledged *Shiffler* as the controlling precedent and noted:

> Because the rights being asserted in an environmental case are not only the rights of the plaintiff but also the rights of the public, inexcusable delay by the plaintiff in asserting his claim is not as significant a factor as it would be in a non-environmental case. Id. at 103. The emphasis in environmental cases is on the prejudice element of the

> analysis. Prejudice in an environmental case, however, is not necessarily the prejudice to the defendants in having the case brought at such a late date but rather it is the prejudice that the public has suffered as a result of the delay in bringing the action. Id. at 103; *see also Township of Parsippany-Troy Hills v. Costle,* 503 F.Supp. 314, 320 (D.N.J. 1979), *aff'd,* 639 F.2d 776 (3d Cir. 1980). (R. 91a-92a).

Nonetheless, the court went on to focus on the delay and interpreted prejudice to mean only the costs of the highway.

Petitioner's so-called "inexcusable delay" was mischaracterized. From the outset, he advised DelDOT that "one of the major concerns is the ecological impact on Punch Bowl Woods [the local name for Lewden Greene Park]." (R. 290a). Mr. Acierno understood that permits for his proposed development depended upon the completion of new Route 7, as noted in Paragraph One of the Declaration restricting use of the land (R. 330a) and by Attorney Whittington's recollections that the rezoning ordinance depended upon the Highway Department being "satisfied." (R. 385a). Not surprisingly, petitioner felt there was a "gun to his head." (R. 266a).

Although he capitulated, Acierno insisted on retaining the right to condition his agreement on approval of the interchange design. (R. 262a, 271a). Then petitioner waited for a final plan and depended upon his lawyer, Lynch, to keep him informed and protect his interests in conferences with DelDOT. But the final plans were not soon forthcoming (R. 302a, 309a); and Lynch was representing now-respondent-intervenor Marta's interests without considering or informing Mr. Acierno. (R. 373a). DelDOT, though, knew of the attorney's and Marta's concealment of events and information from petitioner. (R. 373a). Thus, while Mr. Acierno assumed Lynch would continue to convey his desire to lessen the

environmental impact of the highway to DelDOT, communications and plans progressed without his knowledge. (R. 373a). Any delay in Mr. Acierno's actions challenging the highway were not "knowing" or, by any stretch of the imagination, "inexcusable."

"Undue prejudice," the other component of laches (R. 435a), was also not present in this situation. The highway project was to be completed in three phases, and the phase which was to impose upon the park was not even bid at the time of suit (R. 425a). The environmentally harmful segment could have been relocated without abandoning the earlier phases. The only prejudice to the public would have been a minor cost; minor in comparison to the effects of the chosen route and the millions of dollars required to mitigate the destruction of wetlands. Furthermore, Congress, in passing NEPA and Section 4(f), elevated the importance of protecting the environment, defining it as a significant public interest. Therefore, since petitioner's delay was neither knowledgeable nor inexcusable and the public was not unduly prejudiced, a finding of laches was contrary to the Third Circuit's standards under *Shiffler* and Congress's policies.

III. THE JUDGMENT WAS FURTHER SULLIED BY THE PREJUDICIAL COURSE OF PROCEEDINGS, WHICH WERE A RADICAL DEPARTURE FROM THE ACCEPTED PRECEDENT OF THE CIRCUIT, AND REQUIRE THIS COURT'S CORRECTION.

The judgment below was overwhelmingly prejudiced and should not be allowed to stand. Six weeks after the case and a Motion for Preliminary Injunction were filed, petitioner discovered that the Judge had been counsel for the respondents and his former associate had actually appeared at respondents' counsel table. (R. 257a). No earlier disclosure was made, and when a formal motion was filed, the Judge recused himself. During the time he presided over the case, Judge

Latchum restricted discovery to the motions filed by defendants and denied petitioner a hearing on the Motion for Preliminary Injunction. (R. 226a, 423a).

Petitioner's counsel understands that the District Court of Delaware does not assign cases randomly. Instead, the Chief Judge of the District makes the case assignments in consultation with his colleagues at a weekly private meeting. In this case, therefore, when Judge Latchum recused himself, the same Chief Judge who had assigned the case to Judge Latchum then assigned the case to himself. Chief Judge Longobardi denied petitioner's request for an out-of-district judge. (R. 397a).

The Chief Judge retained and narrowed Judge Latchum's restrictions on discovery:

> Discovery is limited to the very narrow scope of your laches issue, those two items [prior knowledge and undue prejudice] that you [counsel for respondents] just described. And the ruling will be made on those two very narrow issues and nothing else, because I am limiting this discovery. (R. 436a)

He then granted respondents' Motion for Summary Judgment on laches, but *sua sponte* expanded the ruling beyond the limited scope of discovery and issues he had established, and granted judgment on all of petitioner's environmental claims on the merits. (R. 124a). Thus, Chief Judge Longobardi ruled on the merits on the basis of petitioner's claims without allowing him any discovery and/or presentation of evidence. Such action is directly contrary to all precedent, which holds that a court cannot grant summary judgment on the merits when plaintiff was denied necessary, unrestricted discovery. *J.F. Feeser, Inc. v. Serv-A-Portion, Inc.*, 909 F.2d 1524 (3d Cir. 1990). Judgment based on an expanded theory provided by the court itself is error. *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 760 F.2d 2347 (2d Cir. 1985). The Chief Judge's "conversion" of respondent's motions under Fed.R.Civ.P.

Rule 12(b)(6) into motions for summary judgment denied petitioner the requisite "reasonable opportunity to present all material made pertinent."

Such bizarre rulings, based on limited discovery, are unacceptable surprises. *See,* e.g., *Serv-A-Portion, supra; Davis Elliot Int'l, Inc. v. Pan American Container Corp.,* 705 F. 2d 705 (3d Cir. 1983); *Portland Retail Druggists Ass'n v. Kaiser Foundation,* 662 F. 2d 641 (9th Cir. 1981); *United States v. Lewisburg Area School District,* 539 F. 2d 301 (3d Cir. 1976). Further, courts are required to weigh the laches defense against the public environmental interest, per *Shiffler,* 548 F.2d at 96. So even the determination of a narrow laches claim will necessitate the evaluation of the case's merits. Despite the fact that the District Court of Delaware's decision was prejudicial, suggested impropriety and injustice, and directly conflicted with precedent, the Court of Appeals for the Third Circuit affirmed the judgment without any opinion (or other explanation). Petitioner also received no explanation for the transfer of his stay request in the Court of Appeals to a Delaware judge and another judge, who was a former opponent of petitioner's counsel in a similar case, *CARE v. Volpe,* 330 F.Supp. 918 (M.D. Pa. 1971). One of the two judges to whom the case was initially assigned, Judge Mansman, joined Chief Judge Sloviter in dissenting from the denial of rehearing en banc without answers; they "would have required an answer to the petition for rehearing."

Petitioner's repeated requests, at the trial and appellate levels, for remedy of the taint of prejudice, impropriety, and injustice engulfing his case were met with more of the same. The actions of these courts have vitiated the prior proceedings and produced a flawed ruling. The errors of the judgments below must be rectified.

CONCLUSION

For the foregoing reasons a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Third Circuit, and of the United States District Court for the District of Delaware.

Respectfully submitted,

ROBERT J. SUGARMAN
Attorney for Petitioner

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 90-3566

FRANK ACIERNO, Individually and as Trustee
Ad Litem for Residents and Tenants,
Appellant

v.

SAMUEL K. SKINNER, Individually and in His Capacity as Secretary, U.S. Department of Transportation; JOHN DAVIS, Individually and in His Capacity as Director of the Highway Division, Delaware Department of Transportation; MANUEL MARKS, Individually and in His Capacity as Division Administrator, Federal Highway Administration; THOMAS D. LARSON, Individually and in His Capacity as Federal Highway Administrator; RONALD C. CARMICHAEL, Individually and as Delegee, Federal Highway Administrator and ALBERT MARTA

SUR PETITION FOR REHEARING

BEFORE: SLOVITER, *Chief Judge;* BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, NYGAARD, COWEN, and ALITO, *Circuit Judges;* and BUCKWALTER*, *District Judge*

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the

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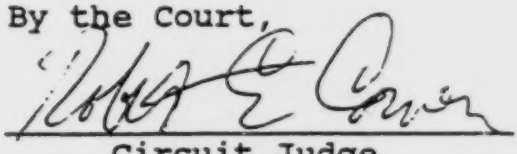
*Honorable Ronald L. Buckwalter, United States District Court for the Eastern District of Pennsylvania, sitting by designation, as to panel rehearing.

decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

Chief Judge Sloviter and Judge Mansmann would have required an answer to the petition for rehearing.

By the Court,



Circuit Judge

Dated: March 29, 1991

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 90-3566

FRANK ACIERNO, Individually and as Trustee
Ad Litem for Residents and Tenants,
Appellant

v.

SAMUEL K. SKINNER, Individually and in His Capacity as Secretary, U.S. Department of Transportation; JOHN DAVIS, Individually and in His Capacity as Director of the Highway Division, Delaware Department of Transportation; MANUEL MARKS, Individually and in His Capacity as Division Administrator, Federal Highway Administration; THOMAS D. LARSON, Individually and in His Capacity as Federal Highway Administrator; RONALD C. CARMICHAEL, Individually and as Delegee, Federal Highway Administrator and ALBERT MARTA

On Appeal from the United States District Court
for the District of Delaware
(D.C. Civil No. 90-00150)
District Judge: Hon. Joseph J. Longobardi

Submitted Under Third Circuit Rule 12(6)
February 22, 1991

Before: GREENBERG and COWEN, *Circuit Judges,*
BUCKWALTER, *District Judge**

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*Honorable Ronald L. Buckwalter, United States District Court for the Eastern District of Pennsylvania, sitting by designation.

JUDGMENT ORDER

After considering the contentions raised by appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed. Costs taxed against appellant.

ATTEST:

Sally Mrvos, Clerk
Dated: February 28, 1991

By the Court,

CIRCUIT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Civil Action No. 90-150 LON

FRANK E. ACIERNO,

Plaintiff,

v.

SAMUEL SKINNER, et al.,

Defendants.

Stephen B. Potter, Esquire, of Potter, Spiller, Crosse & Leonard, Wilmington, Delaware; Of Counsel: Robert J. Sugarman, Esquire of Sugarman & Associates, Philadelphia, Pennsylvania; Attorneys for Plaintiff.

Kent A. Jordan, Esquire, U. S. Attorney's Office, Wilmington, Delaware; Attorney for Federal Defendants.

Frederick H. Schrank, Esquire, Attorney General's Office, Wilmington, Delaware; Attorney for State of Delaware Defendants.

Stephen E. Herrmann, Esquire of Richards, Layton & Finger, Wilmington, Delaware; Attorney for Defendant-Intervenor.

OPINION

CERTIFIED:
AS A TRUE COPY:
ATTEST:
J. R. MC ALLISTER, JR., Clerk

Elizabeth O'Connor
Deputy Clerk

August 7, 1990
Wilmington, Delaware

LONGOBARDI, *Chief Judge*

This case arises out of the realignment of Delaware Route 7 in the vicinity of Interstate 95 and the Christiana River in Delaware. In his complaint, the Plaintiff, a co-owner of land through which the new Route 7 is to be constructed, alleges that the United States Department of Transportation ("U.S. DOT"), the Federal Highway Administration ("FHWA"), the Delaware Department of Transportation ("DelDOT") and various officials employed by these agencies violated the Federal-Aid Highway Act, 23 U.S.C. §138, the National Environmental Policy Act, 42 U.S.C. §4321, *et seq.,* the Uniform Relocation Assistance and Real Property Acquisition Policies Act, 42 U.S.C. §4651. the Civil Rights Act, 42 U.S.C. §1981, and various Delaware statutes in the process of designing and constructing the new Route 7. Shortly after the complaint was filed, Albert H. Marta, co-owner with the Plaintiff of the property through which the new Route 7 will run, intervened as a Defendant.

Presently before the Court are the Federal Defendants' motion to dismiss, their motion for summary judgment and their motion to strike the Plaintiff's jury demand. In addition, the State Defendants move for summary judgment as does Defendant-Intervenor Marta.

I. FACTS

A. *Design and Construction History*

In late 1974, DelDOT began studying the possibility of upgrading the then existing Delaware Route 7 which connected U.S. Route 13 with Interstate 95. Docket Item ("D.I.") 25C at 1.[1] It was understood from very early in the process that some form of environmental

1. Docket Items 24A-25C are the Administrative Record. The Administrative Record in this case refers to the record developed by the FHWA in connection with the planning, design and construction of the upgraded Delaware Route 7.

analysis would have to be performed and that if land were to be taken from Lewden Greene Park, a Section 4(f)[2] determination would have to be made. D.I. 25C at 27, 37.

In April of 1983, the FHWA, in conjunction with DelDOT, decided that because the proposed action would likely not have any significant social, economic or environmental impacts, an Environmental Assessment ("EA") would be performed instead of the more comprehensive Environmental Impact Statement ("EIS"). D.I. 25C at 200. This information was published in the Federal Register on April 21, 1983. A draft of the EA was prepared and circulated to the public and various agencies shortly thereafter. In July of 1984, a revised draft EA incorporating comments from the public and other state and federal agencies was prepared and circulated. D.I. 25A, Document ("Doc.") F. Using the revised EA draft, Manuel Marks, FHWA Division Administrator, made a finding of No Significant Impacts on August 21, 1984. D.I. 25C at 314. This information was made available to the public shortly thereafter. *Id.*

By 1983, the location study for the project was completed and it was determined that the preferred alignment of the highway would pass through Lewden Greene Park. D.I. 48. Pursuant to this decision, a 4(f) Determination was made in March of 1983 which concluded that there were no feasible or prudent alternatives to the use of land from Lewden Greene Park and that harm to the area would be minimized. On March 26, 1984, Vincent Ciletti, Regional Director of the FHWA approved the Section 4(f) Determination for the use of the parkland for the Route 7 project (the "Project"). D.I. 25C at 230-34.

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2. Pursuant to Section 4(f) of the Department of Transportation Act, 49 U.S.C. §303, and Section 138 of the Federal-Aid Highway Act, 23 U.S.C. §138, before any public parks or historic areas may be affected by a transportation project, a determination must be made that there is no feasible and prudent alternative to the project and that harm to the area is minimized.

On August 21, 1984, the Route 7 project received location approval from FHWA. This information along with all maps, drawings and environmental statements, including the EA and the 4(f) Determination, were made available to the public on that date.

For construction purposes, the Project was divided into three phases. Phase I of the Project is the one which will pass through the Plaintiff's property and through Lewden Greene Park.

With respect to Phases II and III, public design hearings were held on June 12, 1985, and the Delaware Division of FHWA approved the Phase II and III designs on October 16, 1985. D.I. 25D at 887-88. Phase II was bid in March of 1987. D.I. 67. The bid that was accepted called for a contract price of $15,335,793.65. *Id.* As of the time of this lawsuit, more than 13 million dollars had been spent on Phase II. *Id.* Phase III was bid in December of 1987 and the contract award totaled $12,499,460.35. As of the time of this lawsuit, nearly half of that amount had been spent. *Id.*

In conjunction with the construction associated with Phase II of the project, a 70-80 foot swath was cut through the woods in Lewden Greene Park. D.I. 32. The purpose of this clearing was to allow adequate drainage for the Phase II section of the highway. The clearing took place in August of 1987 and was clearly visible from nearby public roads. *Id.*

An initial design public hearing for Phase I of the Project was held on October 3, 1985. D.I. 25B, Doc. G. The preferred alignment proposed at this meeting passed through the Plaintiff's property and Lewden Greene Park. *Id.* Due to concerns regarding federal and state wetlands regulations, flood-plain ordinances, erosion control, sediment control and the local drainage code, the design of Phase I changed between 1985 and 1987. D.I. 25B, Doc. I.[3] On November 18, 1987, a new

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3. It appears from the administrative record that the design change involved a concern about the project's crossing at Eagle

design public hearing was held for Phase I. *Id.* Although the design differed from that proposed at the original public hearing in 1985, the location of the Phase I section of the project remained the same. That is, it still passed through Lewden Greene Park and the Plaintiff's property. On August 1, 1989, the U.S. Army Corps of Engineers issued a wetlands permit for Phase I and on January 29, 1990, the Delaware Division of FHWA authorized Phase I for advertising of bids. D.I. 25D at 781.

B. *The Plaintiff's Involvement with the Project*

The Plaintiff initially became aware of the proposal for a four lane highway connecting I-95 to U.S. Route 13 in December of 1978 when a notice to that effect was published in the *Wilmington News Journal.* D.I. 41. During the location process, DelDOT solicited comments from the owners of property that would be affected by the project. In 1981, the Plaintiff wrote a letter to Joseph T. Wutka, Jr., Location Studies and Environmental Engineer for DelDOT, expressing his view that the proposed alignment of the new Route 7 that passed through his property and Lewden Greene Park would be preferable. D.I. 48, Exhibit ("Ex.") B. The alignment

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Run, a federally designated wetland. In the process of performing the EA, officials from the Army Corps of Engineers ("COE") made an on-site inspection of the project site. At that time, no concern was voiced with respect to the Eagle Run area because Eagle Run was not considered to be federally regulated wetlands. D.I. 25D at 514. As a result, discussion of the Eagle Run crossing was not included in the Revised EA.

Subsequently, however, when DelDOT sought to obtain a COE permit to begin construction of the Christiana River crossing, COE asserted that Eagle Run *was* federally regulated wetlands and that the project's design in that area, which originally contemplated fill, would have to be changed. As a result of a joint effort among COE, FHWA, DelDOT, the Environmental Protection Agency and Delaware Department of Natural Resources and Environmental Control, the design was changed to span a 200 foot section of the Eagle Run wetlands.

preferred by the Plaintiff is the one that was eventually chosen and which received location approval by FHWA in 1984. It is also the alignment about which the Plaintiff is presently complaining.

Once it became a possibility that the new Route 7 would pass through the Plaintiff's and the Defendant-Intervenor's (the "Owners") property, the Owners and DelDOT began negotiating the terms under which the State would acquire the property it needed to complete the Project. In November of 1982, the Owners sought to rezone the parcel of land through which the proposed Route 7 would run. Pursuant to the rezoning, the Owners filed deed restrictions that donated the land needed for the roadbed of the project and reserved, but did not donate, the land needed for the access exchange. D.I. 45. In connection with the rezoning of the property, the owners became aware of the decision to perform an EA instead of EIS in late 1982. D.I. 48.

The Owners and DelDOT continued to negotiate over whether the Owners would donate the land needed for the exchange. On January 6, 1986, the owners agreed to donate the land needed for the exchange with the condition that they could approve the design of the exchange. D.I. 44, Ex. D. DelDOT did not ratify this agreement. The debate continued until September of 1988 when the owners signed an agreement with DelDOT in which the Owners granted DelDOT an irrevocable right of entry for the express purpose of constructing the project. The agreement further contemplated that if the parties did not reach an agreement within one year on the compensation due the Owners for the land taken for the exchange, then the State would commence formal condemnation proceedings and leave the matter of compensation to the Delaware Superior Court. The compensation issue was not resolved by September of 1989 and in November of 1989, DelDOT filed its condemnation action. That matter is currently pending before the Delaware Superior Court.

The Plaintiff was actively involved in the planning of the project practically from its inception and was or should have been familiar with all of the major issues associated with the project. It is undisputed that as early as 1981 he was aware that the project would likely pass through Lewden Greene Park. D.I. 48. The Plaintiff also knew that this likelihood became a reality when the project received location approval in 1984. D.I. 25C at 316-17. The Plaintiff was present at the first design public hearing regarding Phase I of the project in 1985 and was represented at the second hearing in 1987. He knew, therefore, that the location of the project through Lewden Greene Park had not changed as a result of the design changes.

Further, it is undisputed that the Plaintiff was aware in 1983 that the decision had been made to perform an EA instead of an EIS. D.I. 48. Notwithstanding the Plaintiff's actual notice of the decision, the decision was made public in the Federal Register on April 21, 1983. D.I. 48, Ex. A. It is clear then, that the Plaintiff was aware of the major developments regarding the project at the time they were happening.

II. DISCUSSION

The Plaintiff brought this action challenging several of the procedures associated with the design and construction of the project. In Count I, the Plaintiff complains that the 4(f) Determination made pursuant to Section 138 of the Federal-Aid Highway Act, 23 U.S.C. §138, was improperly delegated to an official unauthorized to make such a determination and that the determination itself was arbitrary, capricious and an error of law. Count II alleges that the Defendants violated the National Environmental Policy Act ("NEPA"), 42 U.S.C. §4321, *et seq.*, by failing to perform an Environmental Impact Statement in connection with the Project. Count III alleges that the Defendants violated the Uniform Relocation Assistance and Real Property Acquisition

Policies Act, 42 U.S.C. §4651, by failing to fully disclose the nature and extent of the taking of the Plaintiff's land and by failing to offer consideration for the taking. Count IV alleges that the Defendants violated "42 U.S.C. §1981 et seq.", and the Fifth Amendment of the Constitution by denying Plaintiff equal protection and due process of law.[4] In Count V, the Plaintiff makes essentially the same allegations alleging violations of Delaware state law.

The Federal Defendants, the State Defendants and the Defendant-Intervenor have moved for summary judgment on the ground that the complaint should be barred by laches. As will be discussed below, the Federal Defendants and the State Defendants raise other arguments in support of their motions to dismiss and for summary judgment. The Federal Defendants have also moved to strike the Plaintiff's jury demand. The Court will address the Defendants' arguments seriatim.

A. *Laches*

The Defendants assert that the doctrine of laches should bar all of the Counts in the Plaintiff's complaint. The Court is not convinced, however, that the equitable remedy of laches should operate to bar Counts III, IV and V of the complaint which seek legal remedies. Because the Court's decisions regarding those Counts rest on other grounds, it is not necessary to resolve the

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4. Count IV of the Complaint specifically states:

> . . . the defendants have acted with intentional malediction toward the plaintiff, and overreaching of their authority, and in denial of his rights, as a result of their effort to punish plaintiff for his status, without regard to his fault, and have otherwise blocked and prevented the plaintiff from enjoying equal protection, by misleading him as to the intent and nature of a right of entry which he executed, by concealing from him the extent of the taking, by acting in concert with Christiana Mall to deny him the use of his property and by denying him compensation for land taken by defendants from plaintiff.

question of whether laches applies to them. The laches discussion therefore will be confined the Counts I and II.

A claim will be barred by laches if the defendant is successful in establishing that the plaintiff exhibited inexcusable delay in instituting the suit and that there is undue prejudice resulting from the delay. *Shiffler v. Schlesinger,* 548 F.2d 96, 103 (3rd Cir. 1977); *Shipley Road Civic Alliance v. U.S. Dep't of Transportation,* No. 88-204MMS, slip op. at 6, Schwartz, J. (D.Del. May 12, 1988); *Daingerfield Island Protective Soc. v. Hodel,* 710 F.Supp. 368, 373 (D.D.C. 1989). Although not a favored defense in environmental cases, it is well-settled that when the above criteria are met, the doctrine of laches is applicable in such cases. *Shiffler,* 548 F.2d at 103; *National Parks and Conservation Ass'n. v. Hodel,* 679 F.Supp. 49, 53 (D.D.C. 1987); *Mansfield Area Citizens Group v. United States,* 413 F.Supp. 810, 825 (M.D.Pa. 1976).

The Third Circuit in *Shiffler v. Schlesinger,* 548 F.2d at 96, addressed the question of the how the laches doctrine should be applied to environmental cases. In *Shiffler,* the plaintiff brought suit to enjoin the consolidation of the Army Signal School at Fort Monmouth, New Jersey, with the Southeastern Signal School at Fort Gordon, Georgia, because an EIS was not prepared in connection with the decision to make the consolidation. Plaintiffs brought suit two and one-half years after public announcement of the consolidation and after 85% to 90% of the relocation was complete. *Id.* at 104.

In upholding the District Court's dismissal on the basis of laches, the court stated that although the laches defense is applicable to environmental cases, the analysis of the elements of the defense is somewhat different. Because the rights being asserted in an environmental case are not only the rights of the plaintiff but also the rights of the public, inexcusable delay by the plaintiff in asserting his claim is not as significant a factor as it would be in a non-environmental case. Id. at 103. The

emphasis in environmental cases is on the prejudice element of the analysis. Prejudice in an environmental case, however, is not necessarily the prejudice to the defendants in having the case brought at such a late date but rather it is the prejudice that the public has suffered as a result of the delay in bringing the action. *Id.* at 103; *see also Township of Parsippany – Troy Hills v. Costle,* 503 F.Supp. 314, 320 (D.N.J. 1979), *aff'd,* 639 F.2d 776 (3rd Cir. 1980).

In addressing the prejudice prong of the laches analysis in environmental cases, courts have considered factors such as the extent to which the project has been completed, the cost to the Government of enjoining the project, *Shiffler, supra; see also, Save Our Wetlands v. U.S. Army Corps of Engineers,* 549 F.2d 1021, 1028 (5th Cir.), *cert. denied,* 434 U.S. 836 (1977); *Organizations United For Ecology v. Bell,* 446 F.Supp. 535, 546 (M.D.Pa. 1978), whether the environmental impact of the project sought to be enjoined had been assessed in some fashion, *Township of Parsippany – Troy Hills,* 503 F.Supp. at 320, and whether an injunction would likely produce environmental benefits given the extent to which the project has been completed. *Shiffler, supra.*

It is absolutely clear in this case, that the Plaintiff exhibited considerable delay in bringing this action. With respect to both Count I alleging a defective 4(f) determination and Count II alleging a failure to perform an EIS, the Plaintiff was aware of the facts surrounding his claims at least six years prior to his instituting this lawsuit.

The Plaintiff was or should have been aware in 1984 that the highway would run through Lewden Greene Park because this was when the project received location approval from FHWA. In fact, the Plaintiff admits in his affidavit that as early as 1983 he was aware that the project would run through the park. The Plaintiff's affidavit states:

> There are statements in the affidavits that I did not object to a highway corridor choice, from the nine or more alternatives, that used part of Lewden Greene Park, during the environmental review in 1983 and 1984. This is true, but only because I entered into the agreements for rezoning, dedication of the 100 acres of parkland from our holdings, and other actions . . . .

D.I. 59, Ex. A. The 4(f) determination concluding that there were no feasible or prudent alternatives to the taking of the parkland was made public in 1984. D.I. 25C at 317; D.I. 25A, Doc. F. Despite subsequent design changes in the Project, the Project's location through Lewden Greene Park never varied. The Plaintiff knew of the facts surrounding his 4(f) claim at least six years before he initiated this action.

With respect to the facts surrounding his NEPA claim, the Plaintiff was or should have been aware in 1984 that no EIS was going to be performed in connection with the project. Based upon the EA, the FHWA made a finding of No Significant Impacts on August 21, 1984. Both the decision not to go ahead with the EIS and the Finding of No Significant Impacts were made public in 1984. Again, despite the subsequent design changes in the project, if the Plaintiff believed that the project would have adverse environmental impacts, he could have voiced this concern in 1984 when the FHWA made its Finding of No Significant Impacts.

In an attempt to excuse his delay, the Plaintiff asserts that he did not bring this suit earlier because he had been actively involved in negotiations with DelDOT over the design of the project. This argument lacks merit because it is abundantly clear from the record that the negotiations between the Plaintiff and DelDOT focused solely on what compensation, if any, the Plaintiff was entitled to as a result of the use of his property for the Project and did not contemplate the environmental issues that the Plaintiff now raises.

Several courts dealing with this issue have found that inexcusable delay of at least six years warrants application of the doctrine of laches. *Shiffler,* 548 F.2d at 104 (upholding District Court dismissal of NEPA claim on laches grounds where plaintiff inexcusably delayed bringing suit for two and one half years); *National Parks and Conservation Ass'n v. Hodel,* 679 F.Supp. 49, 53 (D.D.C. 1987) (three year delay); *Township of Parsippany – Troy Hills v. Costle,* 503 F.Supp. at 319 (two and one-half year delay).

Plaintiff's inexcusable delay of six years certainly weighs the balance heavily in favor of barring the Plaintiff's claim on the ground of laches. However, under the Shiffler formulation of the laches doctrine in environmental cases, a more important factor than the Plaintiff's inexcusable delay is the extent to which the public has been prejudiced by the Plaintiff's failure to assert his claims in a timely fashion.

At the time that the Plaintiff filed suit, more than 50% of the project was complete and more than 20 million dollars had been spent. The court in *Shiffler* recognized that the extent to which there had been significant public expenditure on a project was a factor to be considered in the prejudice analysis. 548 F.2d at 104. Part of the *Shiffler* court's determination that laches should bar the suit in question was based on the finding that the public would be prejudiced by delaying a project in which 85% to 90% of the funds allocated for the project had been spent. *Id; see also Shipley Road Civic Alliance,* C.A. No. 88-204MMS, slip op. at 9 (finding prejudice to the public in allowing the suit to continue where 22% of the funds allocated for the project had been expended); *Township of Parsippany – Troy Hills,* 503 F.Supp. at 320 (barring plaintiff's claims on laches grounds where 15 million dollars had already been spent on the project).

The public will further be prejudiced by allowing the Plaintiff's action to continue in that such delay would thwart the very purpose for which the project was

instituted. The realignment project was originally conceived to address efficiency, capacity and safety concerns associated with the existing Delaware Route 7. As the EA points out, the projected increase in traffic volume over time will only exacerbate these deficiencies. Any delay in the project delays the benefits that the public will derive from the completed project.

Another factor to be considered in the prejudice analysis is whether the environmental damage complained of by the Plaintiff had been considered by the appropriate state and federal agencies. The *Shiffler* court stated "The fact that environmental factors already had been considered carefully [makes] it unlikely that forcing full procedural compliance after the project [is] nearly complete . . . would produce environmental benefits." 548 F.2d at 104.

In the present case, the Plaintiff's 4(f) claim seems to assert that no parkland should be taken for this project. Yet this alternative was carefully considered by DelDOT and FHWA in their 4(f) Determination that no feasible or prudent alternative existed to the taking of the parkland. It is abundantly clear from the 4(f) Determination and the 4(f) Evaluation that DelDOT and FHWA considered all the relevant environmental factors in coming to their decision. The Court finds that the public would be prejudiced by delaying the project at this point and requiring FHWA to reconsider alternatives that were fully considered in the initial 4(f) Evaluation and Determination.

With respect to the NEPA claim, the Plaintiff's complaint fails to allege any specific environmental factors not considered by the Defendants in the EA. Nor does the complaint allege any adverse environmental impacts which would result from the completion of the project.[5] The Administrative Record clearly demon-

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5. The Plaintiff's NEPA claim in the complaint states:

31. The environmental assessment and no significant impact finding which defendants filed was inadequate to comply with

strates, however, that the Defendants considered a number of environmental factors in the EA, such as socio-economic impacts, impacts on agriculture, air quality, noise, energy, surface water, ground water, flood plains and wetlands. D.I. 25A, Doc. F. In fact, a review of the EA shows that every procedural concern raised by the Plaintiff's complaint was addressed. The draft EA was circulated to the public and other state and federal agencies, contrary to the allegations in the complaint. Also contrary to the complaint's allegations, the EA discussed the purpose and necessity of the project and the alternatives considered.

The Plaintiff appeared to argue, albeit belatedly, at oral argument that his NEPA claim was based on the adverse impacts the project might have on federally designated wetlands. To the extent that wetlands concerns form the basis of the Plaintiff's NEPA claim, those concerns were addressed by FHWA, DelDOT, COE, EPA and the Delaware Department of Natural Resources and Environmental Control in the process of applying for and obtaining the COE permit to cross federally designated wetlands.

It is apparent then, that any environmental concerns that the Plaintiff might have had were addressed by the agencies involved in the EA. The complaint then, is not that there is some major adverse environmental harm that was not considered by FHWA and DelDOT and which will occur if the project continues rather his complaint is that the Defendants failed to follow the correct procedure under NEPA. The Court finds that the public would be prejudiced by delaying the project at this point to determine whether the Defendants followed

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NOTES *(Continued)*

the statute, in that it was not circulated for comment as a draft environmental impact statement, does not describe the purpose and the necessity or impact of the project as now contemplated, and does not describe its effects, nor does it describe alternatives to the project.

the correct NEPA procedure especially where the Plaintiff raises no environmental concerns in any of his pleadings.

Finally, the Defendant-Intervenor is prejudiced by the Plaintiff's delay in bringing this suit. According to the deed restrictions filed by the Plaintiff and the Defendant-Intervenor for their property, building permits allowing private development will not be issued for the property until construction is complete on the new Route 7. The Plaintiff's delay in bringing this suit has caused and will continue to cause delay in the completion of the project which in turn delays the Defendant-Intervenor from developing his property. *See Park County Resource Council v. U.S. Dept. of Agr.*, 613 F.Supp 1182, 1187 (D.C.Wyo. 1985), *aff'd*, 817 F.2d 609 (10th Cir. 1987) (considering prejudice to defendant intervenors in addition to prejudice to the public in the laches analysis in an environmental case.)

The Plaintiff's six year inexcusable delay in bringing this suit and the prejudice to the public from the Plaintiff's delay warrant the application of the doctrine of laches to Plaintiff's NEPA claim and to his 4(f) claim. Summary judgment is therefore granted to Defendants on Counts I and II of the Plaintiff's complaint.

B. *Count I*

Alternatively, Defendants argue that summary judgment should be granted on Count I because there was no improper delegation of authority with respect to the making of the 4(f) Determination and because the 4(f) Determination was neither arbitrary, capricious nor an error of law.

1. *Improper Delegation*

Plaintiff alleges that Defendants Skinner, Larson and Marks acted arbitrarily in "delegating the [4(f)] finding authority to a lower subordinate official of

FHWA not in a position to determine financial prudence." D.I. 1 at ¶26.

On March 26, 1984, Vincent Ciletti, Regional Director of the FHWA Office of Planning and Program Development, signed the 4(f) Determination that there were no feasible or prudent alternatives to the use of land from Lewden Greene Park and that the proposed action had included all possible planning to minimize harm. The question before the Court is whether Mr. Ciletti was authorized to have made this determination.

The Department of Transportation Act, of which Section 4(f) is a part, specifically authorizes the Secretary of Transportation to delegate and authorize successive delegations of duties and powers of the Secretary and authorizes the officers of the Department of Transportation to subdelegate. 49 U.S.C. §322(b).[6] The Plaintiff points to no statutory support for his argument that this general power to delegate did not extend to the 4(f) Determination made in this case.

Pursuant to this general power to delegate, the Secretary of Transportation has explicitly delegated authority to make 4(f) determinations to the Federal Highway Administrator. 49 C.F.R. §1.45(a)(4); 49 C.F.R. §1.48(b)(21). In addition, the Federal Highway Administrator has express authority to redelegate the power to make 4(f) Determinations. 49 C.F.R. §1.45(b).

Notwithstanding these general and express grants of the power to delegate, the particular delegation involved in this case was upheld by the District Court for the Eastern District of Pennsylvania. *Ashwood Manor Civic Ass'n v. Dole,* 619 F.Supp. 52 (E.D.Pa.), *aff'd,* 779 F.2d 41 (3rd Cir. 1985), *cert. denied,* 475 U.S. 1082 (1986). In *Ashwood,* the plaintiffs asserted that a 4(f)

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6. 49 U.S.C. §322(b) states "(b) The Secretary may delegate, and authorize successive delegations of, duties and powers of the Secretary to an officer or employee of the Department. An officer of the Department may delegate, and authorize successive delegations, of duties and powers of the officer and another officer or employee of the Department . . . ."

Determination was improperly delegated to Vincent Ciletti, the Regional Director of the FHWA Officer of Planning and Program Development. Citing the general and specific grants of authority to delegate cited above, the court held that the delegation was not impermissible.

In light of the forgoing and the fact that the Plaintiff cites no statutory or case law support for his position, the Court finds that the Plaintiff has failed to state a claim with respect to the delegation of authority to make the 4(f) Determination and as such, had the Court not disposed of Count I on laches ground, the Court would dismiss the portion of Count I alleging improper delegation.

2. *Validity of the Section 4(f) Determination*

With respect to Plaintiff's allegation that the 4(f) determination was made arbitrarily, capriciously and in error of law, the Supreme Court in *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402 (1971), established the standard of review to be applied by the reviewing court under such circumstances. The court stated that in the analysis, the reviewing court must consider:

> whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment . . . . Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency.

Id. at 416; *see also Ashwood Manor Civic Ass'n v. Dole,* 619 F.Supp. at 65.

In its review of the roughly 1000 pages of Administrative Record, the Environmental Assessment, the Section 4(f) Evaluation and the Section 4(f) Determination, the Court is satisfied that the Defendants, in coming to the conclusion that there was no feasible or prudent alternative to the taking of the property from Lewden

Greene Park and that the proposed design minimized harm to the park, considered all the relevant factors and did not make any clear errors in judgment.

The Plaintiff appears to challenge the 4(f) determintion on the grounds that it (1) "failed to identify the historic character of the Park" and surrounding properties, (2) failed to establish adequately that alternative alignments were not feasible or prudent, (3) failed to assure adequately that damage to the Park would be minimized and (4) did not include an environmental impact statement (EIS).

Plaintiff's allegation concerning the historic character of the Park and surrounding properties is without merit. In the process of conducting the 4(f) evaluation, a cultural resource survey was conducted of the Project area by DelDOT and the Delaware Bureau of Archaeology and Historic Preservation. This survey identified in the Project area several historic properties listed or eligible for listing in the National Register of Historic Places and several archaeological sites eligible for listing in the National Register. Of these sites, only one archaeological site would be affected by the Project. The Delaware Bureau of Archaeology and Historic Preservation determined that because data-recovery would suitably address the preservation needs of the site, preservation-in-place of the archaeological site was not necessary. D.I. 25A, Doc. F at J-4.[7]

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7. The Final Section 4(f) Evaluation states:

A cultural resource survey of the Project area including the western end of the park has been made by DelDOT in coordination with the Delaware Bureau of Archaeology and Historic Preservation which is the office of the designated State Historic Preservation Officer (SHPO). These efforts resulted in the identification of nearby historic properties located on Section 4(f) Map No. 2. The project will not take or use any of these sites that are listed or eligible for listing in the National Register of Historic Places. The overall effort also resulted in the identification of three archaeological sites that are considered to be eligible for listing in the National Register. One of

The Plaintiff's allegations concerning the failure to consider adequately other feasible and prudent alternatives is likewise without merit. In a detailed discussion, the 4(f) Evaluation describes the process by which DelDOT decided on three alternative routes from the ten alternatives that had been proposed. It is clear from that discussion that DelDOT considered economic, social, cultural and environmental factors in its decision making process. D.I. 25 A, Doc. 4 at J5-J10.

The three alternatives yielded by this process were the Preferred Alignment which required the taking of parkland, the Alternative Alignment which did not require parkland taking and the No-Build Alternative. In another detailed discussion, the 4(f) Evaluation determined that the Alternate Alignment and the No-Build Alternative were not feasible or prudent alternatives to the Preferred Alignment.

The No-Build Alternative was determined not to be feasible or prudent because it would not alleviate the current safety and capacity deficiencies in the current alignment of Route 7. In addition, as population increased in the area these conditions would become worse and adversely affect several listed National Register properties including the Christiana Historic District. Finally, the No-Build Alternative was inconsistent with the adopted Land Use/Transportation Plan of the area.[8]

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these potentially eligible archaeological sites is located in the affected section of Lewden Greene Park. The site, which has and will likely yield prehistoric information, is concentrated along the river embankment. The SHPO staff concurs in the opinion that none of these archaeological resources warrant preservation-in-place and that data recovery would be suitable mitigation should the project be incapable of avoidance.

8. The Final 4(f) Evaluation states:

The no-build was evaluated as a viable alternative. Its implementation, however, would do nothing to alleviate the current safety and capacity deficiencies which will only become worse with additional development and resultant traffic increases that

The Alternate Alignment was also rejected as not prudent or feasible because it would increase adverse social and economic impacts including but not limited to additional takings, increased direct costs of between 5.8 and 7.2 million dollars and increased indirect costs in excess of 40 million dollars over the design life of the project. In addition, the Alternative Alignment was inferior from a traffic engineering standpoint. *See* D.I. 25A, Doc. F. at J9-J13.

In light of the above discussion, the court is satisfied that the Defendants, in their determination that no feasible or prudent alternative existed to the taking of the parkland, considered the relevant factors and made no clear errors of judgment.

The Plaintiff's claim concerning the failure to minimize harm to the park is not well taken in light of the considerable portion of the 4(f) Evaluation devoted to the discussion of the significant steps taken to minimize harm. These steps include, among other things, efforts to minimize the total amount of acreage needed for the project and efforts to lessen the environmental consequence of constructing the Project in the park. *See* D.I. 25A, Doc. F at J14-J16.

It is clear from the Evaluation that the Defendants considered the relevant factors and made no clear errors of judgment in determining that the design of the project minimized harm to the parkland.

Plaintiff's claim that the 4(f) Determination is deficient because an EIS was not prepared fails to state a

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NOTES *(Continued)*

are projected for the Project Area. These conditions would continue to adversely affect several listed national Register properties including the Christiana Historic District. The no-build is also totally inconsistent with the adopted Land Use/Transportation Plan that has structured much of the existing and proposed land use resulting in the social and economic stagnation of the Project Area. For these reasons the no-build has also been determined as not being a prudent and feasible alternative to the use of Lewden Greene Park.

claim because nowhere in Section 4(f) of the Department of Transportation, 49 U.S.C. §303, or in its counterpart in the Federal-Aid Highway Act, 23 U.S.C. §138, is there a requirement that an EIS be performed in connection with a 4(f) statement.

For the above reasons, if Count I had not been disposed of on laches grounds, summary judgment would be granted in favor of Defendants on Count I.

C. *Count III*

Count III of the Plaintiff's complaint alleges that the Defendants violated the Federal Uniform Relocation Assistance and Real Property Acquisition Act ("UAR"), 42 U.S.C. §4651, by misrepresenting to plaintiff the nature and extent of the taking of his property and by failing to offer any consideration.

Defendants argue that Count III should be dismissed because the statute to which the Plaintiff refers does not provide a private right of action. Plaintiff contests this assertion although the Court is not convinced that it fully understand the Plaintiff's argument.[9]

Notwithstanding the Plaintiff's assertions to the contrary, the Court finds that the UAR does not provide a private right of action. The Court notes the treatment of this issue by the court in *Barnhart v. Brinegar,* 362 F.Supp. 464 (W.D.Mo. 1973). After a thorough analysis

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9. In his brief in opposition to the motions to dismiss and for summary judgment, the Plaintiff's sole argument on this issue reads:

> The basis for dismissal of the suit under the Federal Uniform Relocation Act, 42 U.S.C. Section 4651 is that damages may be properly evaluated in the District Court. *Willtex Plastics vs. Hud,* 346 F.Supp. 654 (E.D.Pa. 1972, affirmed, 478 F.2d 1399) (3 Cir. 1973). The Third Circuit did not hold that a claim for ownership is not, and a depravation of ownership by the subterfuge employed here is not a violation of the federal statute.

D.I. 59 at 30.

of the text and legislative history of section 301 of the UAR, codified as 42 U.S.C. §4651, the court in *Barnhart* found that "Congress intended . . . to preclude judicial review of federal and state agency action under the real property acquisition practices of section 301 of the Act." *Id.* at 472. The court further stated that "Congress passed section 301 as an expression of congressional policy and entrusted faithful execution of its stated policy solely to the administrators of the Act." *Id.* at 473; *see also, Ackerley Communications of Florida v. Henderson,* 881 F.2d 990, 991-92 (11th Cir. 1989); *Will-Tex Plastics Mfg. Inc. v. Department of H. & U. Dev.,* 346 F.Supp. 654, 660 (E.D.Pa. 1972), *aff'd,d* 478 F.2d 1399 (3rd Cir. 1973).

The Court finds the reasoning of these cases persuasive and is unable to find any authority for the contrary position asserted by the Plaintiff. Count III is therefore dismissed because 42 U.S.C. §4651 fails to provide a private right of action.

D. *Count IV*

In Count IV, the Plaintiff alleges that the State Defendants violated "42 U.S.C. Section 1981 et seq.", and the Federal Defendants violated the Fifth Amendment to the Constitution by denying the Plaintiff equal protection and due process of law.

With respect to the claim against the State Defendants, the complaint, as pled, fails to state a claim for relief under 42 U.S.C. §1981.[10] The Supreme Court has held that 42 U.S.C §1981 is "intended to protect from

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10. 42 U.S.C. §1981 states:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains and penalties, taxes, licenses, and exactions of every kind, and to no other.

discrimination identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethical characteristics." *Saint Francis College v. Al-Khazraji,* 481 U.S. 604, 613 (1987). The complaint is completely devoid of any allegations that the Plaintiff fits into any such identifiable classes of persons. The Section 1981 claim, therefore, is dismissed for failing to state a claim.

The Plaintiff argued at oral argument that despite what his complaint stated, he was not asserting a Section 1981 claim against the State Defendants but, in fact, was asserting a Section 1983 claim. He further argued that by adding the "et seq." language to his complaint he did not bind himself to asserting only a Section 1981 claim but allowed himself the ability to assert other claims under the Civil Rights statute.

The Court finds that it would be inappropriate to allow the Plaintiff to assert the Section 1983 claim at this point in light of the fact that it does not appear in the complaint and the fact that the Plaintiff has not taken the opportunity to amend his complaint to assert this claim. It is not the Court's role to devine a cause of action from a complaint where that cause of action has not been pled. The Plaintiff's "42 U.S.C. §1981 et seq." claim against the State Defendants is therefore dismissed. The Plaintiff is, of course, free to assert any Section 1983 claim he might have in another complaint.

With respect to the Fifth Amendment equal protection and due process claim asserted against the Federal Defendants, the Plaintiff has failed to come forward with sufficient evidence to survive summary judgment on this issue.

Plaintiff's claim appears to assert that in the negotiation for the acquisition of his property in connection with the Route 7 project, the Federal Defendants denied him due process and equal protection of the law. Defendants assert that summary judgment should be granted in their favor because the Plaintiff has failed to produce any evidence that the Federal Defendants played any

part in the negotiations for the acquisition of the Plaintiff's property. In fact, the Defendants submitted an affidavit which affirmatively states that the Federal Defendants had "no direct responsibilities or duties with respect to the acquisition of the property owned by the plaintiff and ha[ve) taken no actions pursuant to the acquisition of the plaintiff's property by DelDOT." D.I. 38, Ex. 3.

In the face of such an assertion on a motion for summary judgment, the plaintiff is required to come forward with sufficient evidence to establish the existence of each element of his claim. *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986). In this case, the Plaintiff has come forward with no evidence to support his fifth amendment claim against the Federal Defendants. Summary judgment is therefore granted to the Federal Defendants on Count IV.

Plaintiff may argue that he was not given sufficient time to conduct the necessary discovery to produce evidence on this claim because of the schedule imposed by the Court. It is quite clear, however, from the transcript of the hearing on the Plaintiff's motion for a temporary restraining order that the Court was perfectly willing to allow the Plaintiff additional time in which to conduct discovery on all of the issues raised in the Defendants' motions.[11] The Plaintiff's failure to request additional time for discovery precludes him from arguing that he was not provided a sufficient opportunity to conduct discovery on this claim.

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11. The transcript from the hearing on Plaintiff's motion for a temporary restraining order, D.I. 52, reads as follows: "With regard to the scope of discovery, discovery is limited to dealing with the issues raised by the parties .... Under these circumstances, discovery will be cut off sometime prior to the filing of the brief on June 11. However, upon request of the plaintiff, the Court would give them additional time to conduct discovery and thereby move the oral argument date from June 20 to some other date." D.I. 52 at 14.

E. *Count V*

In addition to the federal law claims previously discussed, the Plaintiff raises a number of state law claims in connection with the realignment of Route 7. Having disposed of the federal claims on several different grounds, the Court declines to exercise pendant jurisdiction over the remaining state law claims. *Mine Workers v. Gibbs,* 383 U.S. 715, 726 (1966). The state law claims are therefore dismissed.

III. CONCLUSION

With respect to Counts I and II of the Plaintiff's complaint, the Court finds that they are barred by the doctrine of laches. Count III is dismissed because the statute under which the Plaintiff asserts his claim does not provide a private right of action. Count IV is dismissed with respect to the State Defendants and summary judgment is granted in favor of the Federal Defendants. Count V is dismissed for lack of subject matter jurisdiction.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Civil Action No. 90-150 LON

FRANK E. ACIERNO,

Plaintiff,

v.

SAMUEL SKINNER, et al.,

Defendants.

ORDER

NOW, THEREFORE, for the reasons set forth in the Court's Opinion issued this date,

IT IS ORDERED that:

1. Count I and Count II are barred by the doctrine of laches.

2. Count III is dismissed because the statute under which the Plaintiff asserts his claim does not provide a private right of action.

3. Count IV is dismissed with respect to the State Defendants and summary judgment is granted in favor of the Federal Defendants.

4. Count V is dismissed for lack of subject matter jurisdiction.

8/7/90

Joseph J. Longobardi, D.J.

CERTIFIED:
AS A TRUE COPY:
ATTEST:
J. R. MC ALLISTER, JR., Clerk
BY: Elizabeth O'Connor
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Civil Action No. 90-150 LON

FRANK E. ACIERNO,

Plaintiff,

v.

SAMUEL SKINNER, et al.,

Defendants.

ORDER

Pending further consideration of the issues raised by the parties,

IT IS ORDERED that:

1. The Court's decision with respect to Count IV as it relates to the Federal Defendants in its Opinion of August 7, 1990, Docket Item ("D.I.") 72, is withdrawn.

2. The Court's decision with respect to Count V in its Opinion of August 7, 1990, is withdrawn.

3. The Court's Judgment Order of August 7, 1990, D.I. 73, is modified accordingly. In paragraph 3 of the Order, the grant of summary judgment in favor of the Federal Defendants is withdrawn. In paragraph 4 of the Order, the dismissal of Count V is withdrawn.

8/9/90

Joseph J. Longobardi, D.J.

CERTIFIED:
AS A TRUE COPY:
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J. R. MC ALLISTER, JR., Clerk
BY: _____
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

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Civil Action No. 90-150 LON

– – – – –

FRANK E. ACIERNO,

Plaintiff,

v.

SAMUEL SKINNER, et al.,

Defendants.

ORDER

On August 7, 1990, this Court issued an opinion which barred Counts I and II of the Plaintiff's complaint on the basis of laches, dismissed Counts III, a portion of IV and V and granted summary judgment on the remaining portion of Count IV (the "August 7, 1990, Opinion"). Pending further consideration of the issues presented by the parties, the Court withdrew its decisions regarding the portion of Count IV upon which summary judgment was granted and Count V. The portion of Count IV in question dealt with equal protection and due process claims asserted against the Federal Defendants and Count V dealt with the Plaintiff's state law claims. Upon further consideration, the Court now modifies the August 7, 1990, Opinion with these additional holdings.

In Count IV of his Complaint, the Plaintiff alleges that the Federal Defendants violated the Fifth Amendment to the Constitution by denying the Plaintiff equal protection and due process. Docket Item ("D.I.") 1. The exact nature of the Plaintiff's claim is unclear from the Complaint. In the legal claims section of the Complaint, the Plaintiff states:

> . . . the defendants have acted with intentional malediction towards the plaintiff, and overreaching of their authority, and in denial of his rights, as a result of their effort to punish plaintiff for his status, without regard to his fault, and have otherwise

> blocked and prevented the plaintiff from enjoying equal protection, by misleading him as to the intent and nature of a right of entry which he executed, by concealing the extent of the taking, by acting in concert with the Christiana Mall to deny him the use of his property and by denying him compensation for land taken by defendants from plaintiff.

D.I. 1. In the factual assertions of the Complaint the Plaintiff avers that the State Defendants illegally extracted a promise from the Plaintiff to donate 18 acres of land for the project and then, with the endorsement of the other Defendants, expanded the size of the "taking" to 38 acres. The Complaint in other places asserts that the Defendants "illegally [took] plaintiff's land without notice, compensation or opportunity for relocation", D.I. 1, and that the Defendants attempted to "seize all property . . . by ruse and otherwise." D.I. 1.

In response to these assertions, the Federal Defendants moved to dismiss the claim because (1) it fails to state a claim and (2) because the Court lacks jurisdiction. In his brief in response to the Defendants' motions for summary judgment and to dismiss, the Plaintiff fails to address the arguments raised by the Federal Defendants. In fact, the Plaintiff's brief does not mention Count IV as it applies to the Federal Defendants.

The Federal Defendants argue that there are no factual allegations in the complaint to support this claim against them. Federal Rule of Civil Procedure 12(b)(6) warrants dismissal where the facts alleged fail to state a claim against the defendant. Fed.R.Civ.P. 12(b)(6); *see also, Colburn v. Upper Darby Tp.,* 838 F.2d 663, 665-66 (3rd Cir. 1988) (Court must "determine whether, under any reasonable reading of the pleadings, the plaintiff may be entitled to relief.") However, when the claim is one for a civil rights violation, more specificity is required of the complaint. *Ross v. Meagan,* 638 F.2d 646,

d650 (3rd Cir. 1981) ("complaint [must] contain a modicum of factual specificity, identifying the particular conduct of defendants that is alleged to have harmed plaintiffs.")

Under the heightened scrutiny required of civil rights claims, courts have held that to be sufficiently specific, the complaint must allege "the specific conduct violating the plaintiff's rights, and the time and the place of that conduct, and the identity of the responsible officials." *Dist. Council 47, American Federation v. Bradley,* 795 F.2d 310, 314 (3rd Cir. 1986).

In the present case, it is apparent that the Plaintiff failed to plead his constitutional claims against the Federal Defendants with sufficient specificity. Although the complaint mentions that "all defendants endorsed" Defendant Davis' alleged attempt to expand the amount of property taken from the Plaintiff, nowhere in the Complaint are there allegation of specific conduct on the part of the Federal Defendants which violated the Plaintiff's rights.

Further, in his clarification at oral argument of his claim under Count IV, the Plaintiff discussed conduct on the part of the State Defendants but did not mention any conduct attributable to the Federal Defendants. In fact, when asked at oral argument about the facts surrounding his civil rights claims, the Plaintiff stated that he was not joining the Federal Defendants in his claim. D.I. 71 at 42.

In the absence of specific allegations against the Federal Defendants, the constitutional claims against them must be dismissed for failure to state a claim.

As an alternative holding, in its opinion of August 7, 1990, the Court granted summary judgment to the Federal Defendants on Count IV having converted the motion to dismiss into a motion for summary judgment pursuant to Federal Rule of Civil Procedure 12(b). In conjunction with its motion to dismiss this Count, the Federal Defendants submitted an affidavit denying any

involvement in the negotiations with the Plaintiff concerning the amount of property he would donate to the Project. Having considered this affidavit, the Court converted the dismissal motion into a motion for summary judgment. The Plaintiff did not present any evidence in response to the affidavit supporting his claim nor, for that matter, did he present any argument on the issue in his brief. In the absence of such evidence and argument, the Court granted summary judgment to the Federal Defendants.

Assuming, without concluding, that the motion could have been converted to a motion for summary judgment and considering the fact that the Plaintiff presented no evidence on this claim and completely failed to address it in his brief in response to the Defendants' motions, this Court's ruling on summary judgment in its August 7, 1990, Opinion shall remain as an alternative determination on this issue.

With respect to Count V, having disposed of the federal claims on several different grounds, the Court reiterates the position it took in its August 7, 1990, Opinion and declines to exercise pendent jurisdiction over the remaining state law claims.

NOW, THEREFORE, For all of the reasons stated above and in the Court's August 7, 1990, Opinion,

IT IS ORDERED that:

1. Count IV as it applies to the Federal Defendants is dismissed for failure to state a claim upon which relief may be granted.

2. Count V is dismissed for lack of subject matter jurisdiction.

8/10/90

Joseph J. Longobardi, D.J.

CERTIFIED:
AS A TRUE COPY:
ATTEST:
J. R. MC ALLISTER, JR., Clerk

BY: Elizabeth O'Connor
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Civil Action No. 90-150 LON

FRANK E. ACIERNO,

Plaintiff,

v.

SAMUEL SKINNER, et al.,

Defendants.

ORDER

The order of August 10, 1990, is amended in that paragraph 1, page 5 shall read as follows:

1. Count IV as it applies to the Federal Defendants is dismissed without prejudice for failure to state a claim upon which relief may be granted.

8/12/90

Joseph J. Longobardi, D.J.

CERTIFIED:
AS A TRUE COPY:
ATTEST:
J. R. MC ALLISTER, JR., Clerk

BY: Elizabeth O'Connor
Deputy Clerk

Encyclopedias

Federal aid for highways, see C.J.S., Highways §176.

WESTLAW ELECTRONIC RESEARCH

Highways cases: 200k [add key number].

See, also, WESTLAW guide following the Explanation pages of this volume.

NOTES OF DECISIONS

1. Delegation of authority

Subsec. (a) of this section granting governing body of city authority to determine and describe boundaries of central business district to be included within redevelopment plan did not constitute unlawful delegation of legislative power, since term "central business district" provided governing bodies of Kansas cities with adequate standard by which their actions could be reviewed while allowing them to take into account diverse character and geographies of their individual cities. State ex rel. Schneider v. City of Topeka, 1980, 605 P.2d 556, 227 Kan. 115.

§138. Preservation of parklands

It is hereby declared to be the national policy that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites. The Secretary of Transportation shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of the lands traversed. After the effective date of the Federal-Aid Highway Act of 1968, the Secretary shall not approve any program or project

(other than any project for a park road or parkway under section 204 of this title) which requires the use of any publicly owned land from a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance as determined by the Federal, State, or local officials having jurisdiction thereof, or any land from an historic site of national, State, or local significance as so determined by such officials unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use. In carrying out the national policy declared in this section the Secretary, in cooperation with the Secretary of the Interior and appropriate State and local officials, is authorized to conduct studies as to the most feasible Federal-aid routes for the movement of motor vehicular traffic through or around national parks so as to best serve the needs of the traveling public while preserving the natural beauty of these areas.
(Added Pub. L. 89-574, §15(a), Sept. 13, 1966, 80 Stat. 771, and amended Pub. L. 90-495, §18(a), Aug. 23, 1968, 82 Stat. 823; Pub. L. 94-280, Title I, §124, May 5, 1976, 90 Stat. 440; Pub.L. 100-17, Title I, §133(b)(10), Apr. 2, 1987, 101 Stat. 171).

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1966 Act. Senate Report No. 1410 and Conference Report No. 1903, see 1966 U.S.Code Cong. and Adm. News, p. 2800.

1968 Act. Senate Report No. 1340 and Conference Report No. 1799, see 1968 U.S.Code Cong. and Adm.News, p. 3482.

1976 Act. House Report No. 94-716 and House Conference Report No. 94-1017, see 1976 U.S.Code Cong. and Adm.News, p. 798.

1987 Act. Senate Report No. 100-4 and House Conference Report No. 100-27, see 1987 U.S.Code Cong. and Adm.News, p. 66.

References in Text

The effective date of the Federal-Aid Highway Act of 1968, referred to in text, is the effective date of Pub.L. 90-495, which was approved August 23, 1968.

Amendments

1987 Amendment. Pub.L. 100-17 inserted "(other than any other project for a park road or parkway under section 204 of this title)" preceding "which requires" in the third sentence.

1976 Amendment. Pub.L. 94-280 authorized the Secretary, in cooperation with the Secretary of the Interior and appropriate State and local officials, to conduct studies as to the most feasible Federal-aid routes for the movement of motor vehicular traffic through or around national parks so as to best serve the needs of the traveling public while preserving the natural beauty of these areas.

1968 Amendment. Pub.L. 90-495 amended section generally so as to render it identical to former section 1653(f) of Title 49, Appendix, Transportation, governing all programs and projects subject to the jurisdiction of the Secretary of Transportation.

Effective Dates

1968 Act. Amendment by Pub.L. 90-495 effective Aug. 23, 1968, see section 37 of Pub.L. 90-495, set out as a note under section 101 of this title.

LIBRARY REFERENCES

Administrative Law

Environmental impact, see 23 C.F.R. §§77.101 et seq.

Privately owned wetlands, 23 C.F.R. §§777.1 et seq.

American Digest System

Highway funds, see Highways 99¼

Mode and plan of construction or improvement, see Highways 103.

Encyclopedias

Federal aid for highways, see C.J.S. Highways §176.

Mode and plan of construction or improvement, see C.J.S. Highways §179.

WESTLAW ELECTRONIC RESEARCH

Highways cases: 200k[add key number].

See, also, WESTLAW guide following the Explanation pages of this volume.

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1. Construction with other laws—Generally

Where Congress by statute directed that constitution of bridge between the District of Columbia and Virginia go forward "notwithstanding any other provision of law or any court decision or administrative action to the contrary" and that work should commence within 30 days, provisions of the D.C. Code relating to construction and planning of highways, both those which the Court of Appeals had held to be applicable in its prior opinion and those not mentioned in the prior opinion, were rendered inapplicable to the extent that compliance with such provisions would conflict with the direction that work commence within 30 days, but authorities were not precluded from taking advantage of any of the provisions which they might find desirable or useful in

connection with the project. D.C. Federation of Civic Associations v. Volpe, 1971, 459 F.2d 1231, 148 U.S.App.D.C. 207, certiorari denied 92 S.Ct. 1290, 405 U.S. 1030, 31 L.Ed.2d 489.

2. -- Administrative Procedure Act

Decision of Secretary of Transportation authorizing use of federal funds to finance construction of expressway through public park did not fall within exception to reviewability under Administrative Procedure Act, sections 551 et seq. and 701 et seq. of Title 5, for action "continued to agency discretion," and Secretary's decision was subject to judicial review. Citizens to Preserve Overton Park, Inc. v. Volpe, Tenn.1971, 91 S.Ct. 814, 401 U.S. 402, 28 L.Ed.2d 136, on remand 335 F.Supp. 873.

3. Purpose

Purpose of this section relating to preservation of parkland was to preserve parkland by directing Secretary of Transportation to reject its use except in the most unusual situation where no alternative would be available. D.C. Federation of Civic Associations v. Volpe, 1971, 459 F.2d 1231, 148 U.S.App.D.C. 207, certiorari denied 92 S.Ct. 1290, 405 U.S. 1030, 31 L.Ed.2d 489.

4. Retroactive effect

Even if date of approval of project were criterion for applicability of this section and section 1653(f) of Title 49 relating to preservation of parkland in construction of highway unless there is no other feasible route to projects ongoing at effective date of this section and said section 1653(f), this section and said section 1653(f) were still applicable to interstate highway project where Secretary of Transportation's approval was necessary at the several remaining stages of the project. Arlington

Coalition on Transp. v. Volpe, C.A.Va.1972, 458 F.2d 1323, certiorari denied 93 S.Ct. 312, 409 U.S. 1000, 34 L.Ed.2d 261.

5. Historic sites within section

Where petroglyph rock had originally been located in Moanalua and was inseparably linked to historic events that had there long since occurred, rock, so long as it remained in the valley even though it might stand a few feet from its original location, formed basis for historic site within purview of this section and section 1653(f) of Title 49. Stop H-3 Ass'n v. Coleman, C.A. Hawaii 1976, 533 F.2d 434, certiorari denied 97 S.Ct. 526, 429 U.S. 999, 50 L.Ed.2d 610.

6. Project stages to which section applicable

This section and section 1653(f) of Title 49 requiring avoidance of using parklands for highway construction purposes unless no alternate route is feasible are applicable to ongoing federal highway project until it has reached that stage of progress where the cost of altering or abandoning proposed route would certainly outweigh whatever benefits might accrue therefrom, and doubts about whether the stage has been reached must be resolved in favor of the applicability of this section and said section 1653(f). Arlington Coalition on Transp. v. Volpe, C.A.Va.1972, 458 F.2d 1323, certiorari denied 93 S.Ct. 312, 409 U.S. 1000, 34 L.Ed.2d 261.

Total absence of statement showing that there were no feasible and prudent alternatives to routing interstate highway through city park and that such program included all possible planning to minimize harm would have been sufficient reason to halt further action until compliance with this section where there was still significant federal action to be taken; failure to complete statutory statement for park, which lay about one-fourth mile north of northerly most completed portion of alignment, could provide basis to enjoin any further action on

that portion of freeway forming circumferential loop around center of downtown portion of city. Citizens For Mass Transit Against Freeways v. Brinegar, D.C.Ariz.1973, 357 F.Supp. 1269.

Where it was not yet too late for planners of interstate highway, the construction of which plaintiffs sought to enjoin, to administratively choose a different route and contracts yet to be let included those for paving, the letting and performance of which would make selection of another route virtually impossible, the court would enjoin all further activity which would increase the environmental damage already done by the construction, and letting of all further contracts, and work to be performed thereunder, would therefore be enjoined until there had been full compliance with controlling legislation. Brooks v. Volpe, D.C.Wash.1972, 350 F.Supp. 287.

Where state authorities had not yet requested federal approval of highway route, which would be built to federal interstate highway standards, and which would form portion of circumferential urban highway, and certain portions of which were planned to pass through portion of property designated as a registered national historical landmark, project had not reached stage of completion which would preclude enforcement of congressional enactments pertaining to conflict between ecology and construction of urban highway systems. Thompson v. Fugate, D.C.Va.1972, 347 F.Supp. 120.

7. Feasible and prudent alternative—Generally

Secretary of Transportation, Administrator of Federal Highway Administration, and Director of Oklahoma Department of Transportation complied with requirement of statute governing preservation of parklands that parkland not be used unless there is no feasible or prudent alternative. Lake Hefner Open Space Alliance v. Dole, C.A.10 (Okl.) 1989, 871 F.2d 943.

Under provision of this section that Secretary shall not approve any project which requires use of any publicly owned land from a public park unless there is no feasible and prudent alternative to use of such land, a road must not take parkland, unless a prudent person, concerned with quality of human environment, is convinced that there is no way to avoid doing so. Monroe County Conservation Council, Inc. v. Volpe, C.A. N.Y.1972, 472 F.2d 693.

Provisions of Federal Aid Highway Act and Department of Transportation Act prohibiting use of parkland for highway purposes unless there is no feasible and prudent alternative was not rendered inapplicable to proposed highway bypass near park either by park officials' knowledge of possibility of bypass when they acquired land for park or by joint planning of highway and park, where park officials did not evaluate potential environmental, recreational, or aesthetic impacts of bypass upon park, and both officials of park and California Department of Transportation agreed that bypass right-of-way would be used for freeway only if there were no other alternatives. Sierra Club v. U.S. Dept. of Transp., N.D.Cal.1987, 664 F.Supp. 1324.

8. -- **Balancing of Interests**

Neither undoubted need for construction of four-lane limited access freeway through area nor fact that it had been long delayed would justify ignoring standards which Congress provided for balancing paramount interest of protecting areas with unique and priceless environmental, historic and archeological characteristics against importance of providing needed highways, nor would such justify executive department's utilizing funds which Congress provided for replacing and rehabilitating dangerous or obsolete bridges for building proposed bridges while existing bridge would be repaired and retained as continuing segment of existing two-lane open access highway of which it had long been

a part. Wade v. Lewis, D.C.Ill.1983, 561 F.Supp. 913, appeal dismissed 767 F.2d 925.

9. -- Factors considered

Under this section and section 1653 of Title 49 providing that Secretary of Transportation shall not approve any project requiring use of public parkland unless there is no feasible and prudent alternative and such program includes all possible planning to minimize harm to such park, although Secretary should not ignore cost and disruption of the community, the protection of parkland is to be given paramount importance. Citizens to Preserve Overton Park, Inc. v. Volpe, Tenn. 1971, 91 S.Ct. 814, 401 U.S. 402, 28 L.Ed.2d 136, on remand 335 F.Supp. 873.

An alternative to federal highway project which uses parklands or historic sites is prudent unless there are truly unusual factors present in a particular case or the cost or community disruption resulting from the alternative route reaches extraordinary magnitude or the atlernative route presents unique problems. Druid Hills Civic Ass'n, Inc. v. Federal Highway Admin., C.A.11 (Ga.) 1985, 772 F.2d 700, rehearing denied 777 F.2d 704, certiorari denied 109 S.Ct. 60, 102 L.Ed.2d 38.

For purposes of provision of this section that Secretary shall not approve any project which requires use of any publicly owned land from a public park unless there is no feasible and prudent alternative to use of such land, a "feasible alternative route" is one that is compatible with sound engineering, and a "prudent alternative route" is one that does not present unique problems, that is, an alternative without truly unusual factors so that cost or community disruption would reach extraordinary magnitudes. Monroe County Conservation Council, Inc. v. Volpe, C.A.N.Y.1972, 472 F.2d 693.

Fact that previously incurred costs, i.e., "sunk costs," were not included in measuring total cost of proposed route through historic site and protected park

land for federally funded highway project vis-a-vis other alternatives did not mean that cost analysis was impermissibly biased in favor of proposed route, where proposed route was still least expensive alternative, by comfortable margin, even after such cost was considered, and cost did not play significant role in decision of Secretary of Transportation to approve proposed route. Wade v. Dole, N.D.Ill.1986, 631 F.Supp. 1100, affirmed 813 F.2d 798.

10. ––Sufficiency of administrative record

Where record failed to contain current estimates of differences in costs between various alternative locations for proposed highway and bridges, volume of rock cutting at each location, number of residences or businesses which would be adversely affected and extent of community disruption, it was impossible to determine that there were no prudent alternatives to alignment through wildlife preserve and historic site. Wade v. Lewis, D.C.Ill.1983, 561 F.Supp. 913, appeal dismissed 767 F.2d 925.

For substantive purposes of both the National Environmental Policy Act of 1969, section 4321 et seq. of Title 42 and the prudent and feasible inquiry contained in this section and the Department of Transportation Act, section 1651 et seq. of Title 49, administrative record must discuss reasonable alternatives to the proposed route with sufficient objective data to enable the decision maker to assess the alternatives and to make a reasoned choice from among them. Citizens to Preserve Wilderness Park, Inc. v. Adams, D.C.Neb.1981, 543 F.Supp. 21.

11. ––Miscellaneous alternatives feasible

Since an improved two-lane road was a reasonable alternative to proposed construction of a 10.8-mile four-lane segment of United States Highway 2, the main access route into Glacier National Park, but was not

considered, the Secretary of Transportation had failed to consider all alternatives in making his determination under section 1653(f) of Title 49, as the proposed route required taking of parkland. Coalition for Canyon Preservation v. Bowers, C.A.Mont.1980, 632 F.2d 774.

If present and foreseeable traffic needs can be handled without construction of an additional river crossing, an entirely present and feasible alternative to construction of bridge would be no bridge at all, and construction of bridge which would affect historic site and use some parkland would be unlawful. D.C. Federation of Civic Associations v. Volpe, 1971, 459 F.2d 1231, 148 U.S.App. D.C. 207, certiorari denied 92 S.Ct. 1290, 405 U.S. 1030, 31 L.Ed.2d 489.

12. -- Miscellaneous alternatives not feasible

Secretary of Transportation did not exceed scope of her authority in approving modified river crossing route which required taking of parkland based on finding that alternatives were not feasible and prudent; Secretary rejected alternatives based on specified disadvantages including anticipated adverse effects on traffic and safety of other routes, number of residential displacements, high cost of construction and "high detrimental" noise levels in adjoining populated areas, severe intrusion on surrounding rural environment, and minimal resulting improvement of regional traffic on other routes. Town of Fenton v. Dole, N.D.N.Y.1986, 636 F.Supp. 557, affirmed 792 F.2d 44.

Existence of an alternative plan calling for construction of an elevated viaduct did not constitute a feasible and prudent alternative which required permanent injunctive relief against further expenditure of federal funds for construction of an additional three lanes to an existing four-lane highway through Snoqualmie National Forest. Brooks v. Volpe, D.C. Wash.1974, 380 F.Supp. 1287.

In action to enjoin highway relocation, evidence was insufficient to support any finding that alternative plan belatedly suggested by plaintiffs was feasible and prudent or that Secretary in approving plans violated either this chapter or Department of Transportation Act, section 1651 et seq. of Title 49. Pennsylvania Environmental Council, Inc. v. Bartlett, D.C.Pa.1970, 315 F.Supp. 238, affirmed 454 F.2d 613.

13. Use of park land—Generally

Highway, which would pass near petroglyph rock, would "use" land from historic site, within purview of this section and section 1653(f) of Title 49. Stop H-3 Ass'n. v. Coleman, C.A. Hawaii 1976, 533 F.2d 434, certiorari denied 97 S.Ct. 526, 429 U.S. 999, 50 L.Ed.2d 610.

The word "use" within this section is to be construed broadly in favor of environmental statements in cases in which environmental impact appears to be substantial question. Brooks v. Volpe, C.A. Wash.1972, 460 F.2d 1193, on remand 350 F.Supp. 269.

Proposed highway bypass constituted "constructive use" of state park within meaning of statutes prohibiting the use of parkland for highway purposes unless there is no feasible and prudent alternative, where construction of project would require seven cuts into mountains greater than 150-feet deep, which would be visible from park, and proposal to minimize substantial visual changes through revegetation of cuts was not expected to be very successful for significant portion of cuts. Sierra Club v. U.S. Dept. of Transp., N.D.Cal.1987, 664 F.Supp. 1324.

Statutory prohibition against use of a public park for federal highway purposes in absence of an affirmative finding by Secretary of Transportation that there is no feasible or prudent alternative to use and that all possible planning has been done to minimize harm to park was inapplicable in situation where, rather than making

constructive use of park, interstate highway project was itself being constructively used to improve access to park. Arkansas Community Organization for Reform Now v. Brinegar, D.C.Ark.1975, 398 F.Supp. 685, affirmed 531 F.2d 864.

Proposed alignment of portion of interstate highway through city park could be considered a "use" of park, within meaning of this section notwithstanding that city park and recreation board had determined that actual acreage over which freeway would pass was no longer a parkland of local significance within purview of statute; fact that remainder of park was immediately adjacent to freeway route was enough to require statement of compliance with this section. Citizens For Mass Transit Against Freeways v. Brinegar, D.C.Ariz.1973, 357 F.Supp. 1269.

14. -- Question of law

The statutory construction of the word "use" within this section which restricts and conditions use of public parks, recreational areas and wildlife refuges for highway use involved question of law, and Court of Appeals was not bound by the district court's characterization of its interpretation as "finding of fact." Brooks v. Volpe, C.A.Wash.1972, 460 F.2d 1193, on remand 350 F.Supp. 269.

15 . -- Significance of land

Because the very existence of this section and section 1653(f) of Title 49 relating to avoidance of use of parklands indicates protection of parkland is to be given paramount importance, court must interpret this section and section 1653(f) of Title 49 to mean that land used as public park is presumed significant within meaning of this section and section 1653(f) of Title 49 unless explicitly determined otherwise by the appropriate federal or local officials. Arlington Coalition on Transp. v.

Volpe, C.A.Va. 1972, 458 F.2d 1323, certiorari denied 93 S.Ct. 312, 409 U.S. 1000, 34 L.Ed.2d 261.

16. Planning for minimization of harm

Affirmative duty to minimize damage to parkland is a condition precedent to approval for such a taking for highway purposes where federal funds are involved; and the Secretary must withhold his approval unless and until he is satisfied that there has been all possible planning to minimize harm to such parks and that full implementation of such planning to minimize is an obligated condition of the project. Monroe County Conservation Council, Inc. v. Volpe, C.A.N.Y. 1972, 472 F.2d 693.

Approval of bridge construction project by Secretary of Transportation under this section relating to preservation of parklands was premature, and Secretary would have to make new determinations consistent with statutory standards, where absent a finalized plan for the bridge it was difficult to see how the Department of Transportation could make a meaningful evaluation of the "harm" that might result, where Secretary did not consult with other planning agencies to coordinate efforts to minimize harm to the park and historic sites, and where secretary made no studies of potential air pollution damage to the park involved. D.C. Federation of Civic Association v. Volpe, 1971, 459 F.2d 1231, 148 U.S.App.D.C. 207, certiorari denied 92 S.Ct. 1290, 405 U.S. 1030, 31 L.Ed.2d 489.

Secretary of Transportation's determination that highway project which involved destruction of parkland included all possible planning to minimize harm was reasonable. Maryland Wildlife Federation v. Lewis, D.C.Md. 1983, 560 F.Supp. 466, affirmed 747 F.2d 229.

Secretary of Transportation may not authorize use of federal funds to finance construction of highways through public parks if a "feasible and prudent" alternative route exists, and if no such route is available, he

may approve construction only if there has been all possible planning to minimize harm. Brooks v. Volpe, D.C.Wash. 1974, 380 F.Supp. 1287

17. Findings

Absence of formal findings be Secretary of Transportation authorizing use of federal funds for construction of expressway through public park did not require that case be remanded to Secretary even though Department of Transportation regulation issued subsequent to Secretary's decision required Secretary to make formal findings, inasmuch as change in circumstances has occurred since Secretary's decision and there was an administrative record that would allow full, prompt review of Secretary's action. Citizens to Preserve Overton Park, Inc. v. Volpe, Tenn.1971, 91 S.Ct. 814, 401 U.S. 402, 28 L.Ed.2d 136, on remand 335 F.Supp. 873.

Failure of Secretary of Transportation to provide explicit findings indicating the reason that all possible alternatives to proposed bridge would be unfeasible or imprudent did not, in itself, invalidate Secretary's action in approving construction of bridge affecting historic site and parklands, but complete nonexistence of any contemporaneous administrative record is more serious since, absent a record, a judicial review of the Secretary's action can be little more than a formality. D.C. Federation of Civic Associations v. Volpe, 1971, 459 F.2d 1231, 148 U.S. App.D.C. 207, certiorari denied 92 S.Ct. 1290, 405 U.S. 1030, 31 L.Ed.2d 489.

18. Person entitled to maintain action

Threat from proposed highway to well-being of plants and wildlife in sanctuary was threat to interest of nonprofit corporation, which was lessee of ten-acre plot managed as wildlife sanctuary, had right under lease to conduct necessary research in sanctuary, and had as one of its corporate purposes the preservation and restoration of the natural environment, so as to provide

corporation with standing to challenge in federal district court validity of determination by Secretary of Transportation that there was no feasible and prudent alternative to using property south of sanctuary for proposed highway and that project included all possible planning to minimize harm to sanctuary. Wade v. Dole, N.D.Ill.1986, 631 F.Supp. 1100, affirmed 813 F.2d 798.

Plaintiffs who resided in cities through which it was proposed to construct federal-aid highway and who used parks and lived near parklands and forests that might be damaged by construction had standing to bring class action for declaratory and injunctive relief in regard to proposed highway. La Raza Unida. v. Volpe, D.C.Cal. 1971, 337 F.Supp, 221 certiorari denied 93 S.Ct. 105, 409 U.S. 890, 34 L.Ed.2d 147, supplemented 57 F.R.D. 94, affirmed 488 F.2d 559, certiorari denied 94 S.Ct. 3171, 417 U.S. 968, 41 L.Ed.2d. 1138.

19. Review of agency determinations

Litigation affidavits containing "post hoc" rationalizations were an inadequate basis for review of decision of Secretary of Transportation authorizing the use of federal funds for construction of expressway through public park. Citizens to Preserve Overton Park, Inc. v. Volpe, Tenn.1971, 91 S.Ct. 814, 401 U.S. 402, 28 L.Ed.2d. 136, on remand 335 F.Supp. 873.

In reviewing Secretary of Transportation's approval of federal highway project requiring use of parklands or historic sites court must first consider whether the Secretary acted within the scope of her authority by determining whether the Secretary properly construed her authority to approve the use of the property as limited to situations where there are no feasible and prudent alternatives and whether the Secretary could reasonably have believed that no such alternatives exist; court must next determine whether the Secretary's ultimate decision was arbitrary, capricious, or an abuse of discretion by evaluating whether the decision was

based on a consideration of the relevant factors and whether there has been a clear error of judgment; court must finally inquire as to whether Secretary's action followed the necessary procedural requirements. Druid Hills Civic Ass'n, Inc. v. Federal Highway Admin., C.A.11 (Ga.) 1985, 772 F.2d 700, rehearing denied 777 F.2d 704.

Ultimate standard for reviewing findings of Secretary in approving disbursements of federal funds for construction of an expressway was a narrow one, and district court was not empowered to substitute its judgment for that of Secretary. Citizens To Preserve Foster Park v. Volpe, C.A.Ind.1972, 466 F.2d 991.

In reviewing a determination of Secretary of Transportation to authorize use of federal funds to finance construction of highways through public parks, court must first decide whether Secretary acted within scope of his authority, or, in other words, whether a feasible and prudent alternative route existed. Brooks v. Volpe, D.C.Wash.1974, 380 F.Supp. 1287.

20. Presumptions

Decision of Secretary of Transportation authorizing use of federal funds for construction of expressway through public park was entitled to presumption of regularity. Citizens to Preserve Overton Park, Inc. v. Volpe, Tenn.1971, 91 S.Ct. 814, 401 U.S. 402, 28 L.Ed.2d 136, on remand 335 F.Supp. 873.

21. Injunction

Notwithstanding claim that highway construction project would have an adverse impact upon environment, in that area conveyed for project constituted parkland which construction would substantially destroy, and that project was in violation of this section, district court acted within scope of a proper exercise of discretion in refusing to grant a preliminary injunction,

where project was substantially completed, adverse effect, if any, upon environment was negligible as compared with obvious need for correcting a dangerous highway intersection, and possibility that parties seeking injunction would succeed on merits was at best uncertain and problematical. Public Interest Research Group of Michigan (Pingam) v. Brinegar, C.A.Mich. 1975, 517 F.2d 917.

Where an environmental statement formulated by Federal Highway Administrator and ultimately approved by Secretary of Transportation, Administrator found that no feasible and prudent alternative to use of public park for expressway was available, and Administrator also found that all possible planning to minimize harm to park had been carried out, and there was no evidence that approval of project was arbitrary, capricious, and an abuse of discretion, or otherwise not in accordance with law, nor any evidence that Secretary failed to meet constitutional, procedural, or statutory requirements, there was no substantial showing of probable success on merits with regard to approval, and injunction to preliminarily enjoin Secretary from disbursing federal funds for project would not issue. Citizens to Preserve Foster Park v. Volpe, C.A.Ind.1972, 466 F.2d 991.

Where over a period of 14 years there had been many studies considering need and feasibility of highway project, officers of cities, county, state and federal government had approved its establishment, a great deal of public money had been spent to establish highway, construction of highway was a major factor arriving at choice of location for community college and zoning ordinances and programs of community development had been established relying upon eventual construction of highway, construction of highway would not be enjoined because a relatively few persons wished to use the area as recreational area. Citizens Environmental Counsel v. Volpe, D.C.Kan.1973, 364 F.Supp 286, affirmed 484 F.2d 870, certiorari denied 94 S.Ct. 1935, 416 U.S. 936, 40 L.Ed.2d 286.

Where, in action to enjoin on environmental grounds the construction of interstate highway, injunction stopping further work on specific bridge, clearing and grading and foundation exploration contracts would not significantly prevent further defacing of environment, where severe public injury would result from blanket injunction, including additional harm to environment, loss of jobs and claims against state for losses to contractors, where defendants had made good-faith effort to comply with applicable statutes and court orders and where additional work on the existing contracts was not of a nature which would significantly influence final decision on whether to alter the route of a new addition to highway, work on the specific contracts which had already been let would not be enjoined. Brooks v. Volpe, D.C.Wash. 1972, 350 F.Supp. 287.

Preliminary injunction would be granted restraining state defendants from acquiring any more property for right-of-way for federal-aid primary highway which would pass through three cities and restraining federal authorities from granting any further approval of project or providing funds for projects until a satisfactory relocation assistance program was devised, where it appeared that highway would cause displacement of a substantial number of people, that state had inadequate relocation assistance program and had failed to comply with federal relocation standards and regulations, that harm to plaintiffs, who would be relocated, and class they represented was clearly irreparable and there was a high probability that they would prevail on merits. La Raza Unida v. Volpe, D.C.Cal.1971, 337 F.Supp. 221, certiorari denied 93 S.Ct. 105, 409 U.S. 890, 34 L.Ed.2d 147, supplemented 57 F.R.D. 94, affirmed 488 F.2d 559, certiorari denied 94 S.Ct. 3171, 417 U.S. 968, 41 L.Ed.2d 1138.

§4321. Congressional declaration of purpose [NEPA §2]

The purposes of this chapter are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality. (Jan. 1, 1970, Pub.L. 91-190, §2, 83 Stat. 852.)

Short Title

Section 1 of Pub.L. 91-190 Jan. 1, 1970, 83 Stat. 852, provided: "That this Act [enacting this chapter] may be cited as the 'National Environmental Policy Act of 1969'."

Cross References

Pacific Salmon Fishing, regulations of Secretary of Commerce under treaty not subject to this chapter, see section 3636 of Title 16, Conservation.

Federal Practice and Procedure

Environmental class actions, see Wright, Miller & Kane: Civil §1782.

West's Federal Practice Manual

Federal environmental law, see §4381 et seq.

Library References

Health and Environment 25.5.
C.J.S. Health and Environment §61 et seq.

Law Review Commentaries

Regulation of batture pollution and ecology. Stan Millan, 33 Loyola (La.) L.Rev. 921 (1988).

United States Supreme Court

Other statutes, not repealed by implication by this chapter, Aberdeen & Rockfish R. Co. v. Students Challenging Regulatory Agency Procedures, 1975, 95 S.Ct. 2336, 422 U.S. 289, 45 L.Ed.2d 191.

SUBCHAPTER I – POLICIES AND GOALS

§4331. Congressional declaration of national environmental policy [NEPA §101]

(a) Creation and maintenance of conditions under which man and nature can exist in productive harmony

The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

(b) Continuing responsibility of Federal Government to use all practicable means to improve and coordinate Federal plans, functions, programs, and resources

In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may—

(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;

(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

(4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;

(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

(c) Responsibility of each person to contribute to preservation and enhancement of environment

The Congress recognizes that each person should enjoy a healthful environment and that each person has

a responsibility to contribute to the preservation and enhancement of the environment.

(Jan. 1, 1970, Pub. L. 91-190, Title I, §101, 83 Stat. 852.)

Federal Practice and Procedure

Environmental class actions, see Wright, Miller & Kane: Civil 2d §1782.

Library References

Health and Environment 25.5.
C.J.S. Health and Environment §61 et seq.

United States Supreme Court

Environmental effect and environmental impact, terms defined, Metropolitan Edison Co. v. People Against Nuclear Energy, 1983, 103 S.Ct. 1556, 460 U.S. 766, 75 L.Ed.2d 534.

§4332. Cooperation of agencies; reports; availability to information; recommendations; international and national coordination of efforts [NEPA §102]

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall—

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this

chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes;

(D) Any detailed statement required under subparagraph (C) after January 1, 1970, for any major Federal action funded under a program of grants to States shall not be deemed to be legally insufficient solely by reason of having been prepared by a State agency or official, if:

(i) the State agency or official has statewide jurisdiction and has the responsibility for such action,

(ii) the responsible Federal official furnishes guidance and participates in such preparation,

(iii) the responsible Federal official independently evaluates such statement prior to its approval and adoption, and

(iv) after January 1, 1976, the responsible Federal official provides early notification to, and solicits the views of, any other State or any Federal land management entity of any action or any alternative thereto which may have significant impacts upon such State or affected Federal land management entity and, if there is any disagreement on such impacts, prepares a written assessment of such impacts and views for incorporation into such detailed statement.

The procedures in this subparagraph shall not relieve the Federal official of his responsibilities for the scope, objectivity, and content of the entire statement or of any other responsibility under this chapter; and further, this subparagraph does not affect the legal sufficiency of statements prepared by State agencies with less than statewide jurisdiction.[1]

(E) study, develop, and describe appropriate alternatives to recommended courses of action in

any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(F) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(G) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(H) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(I) assist the Council on Environmental Quality established by subchapter II of this chapter.

(Jan. 1, 1970, Pub.L. 91-190, Title I §102, 83 Stat. 853; Aug. 9, 1975, Pub.L. 94-83, 89 Stat. 424.)

[1] So in original. The period probably should be a semicolon.

Cross References

National marine sanctuaries, procedures for designation, preparation of draft environmental impact statement by Secretary of Commerce, see section 1434 of Title 16, Conservation.

Federal Practice and Procedure

Environmental class actions, see Wright, Miller & Kane: Civil 2d §1782.

Environmentally concerned departments and agencies, see §4381.10 et seq.
Mineral leases, see §5301 et seq.
Relation to energy policy, see §4342.5.
Relation to government contracts, see §1530.

Requirements, standards, etc.,
Agency for International Development, see 22 CFR 216.1 et seq.
Agricultural Stabilization and Conservation Service, see 7 CFR 799.1 et seq.
Bureau of Land Management, see 43 CFR 3040 et seq., 6290.0-2 et seq.
Civil Aeronautics Board, see 14 CFR 201.1 et seq., 261.1 et seq., 312.1 et seq., 399.1 et seq.
Coast Guard, see 46 CFR 12.01 et seq., 71.01-1 et seq., 91.01-1 et seq., 105.01-1 et seq., 176.01-1 et seq., 189.01-1 et seq.
Committee for Purchase from the Blind and Other Severely Handicapped, see 41 CFR 51-6.1 et seq.
Consumer Products Safety Commission, review, see 16 CFR 1021.1 et seq.
Council on Environmental Quality, see 40 CFR 1500.1 et seq., 1510.1 et seq.
Defense Department, see 32 CFR 214.1 et seq.
Energy Research and Development Administration, see 10 CFR 711.1 et seq.
Environmental Protection Agency, see 40 CFR Ch. 1.
Federal Aviation Administration, see 14 CFR 21.1 et seq., 36.1 et seq., 91.1 et seq.
Federal Highway Administration, see 23 CFR 420.101 et seq., 712.101 et seq., 751.1 et seq., 770.200 et seq., 771.1 et seq., 772.1 et seq.
Federal Maritime Commission, see 46 CFR 547.1 et seq.

Federal Trade Commission, see 16 CFR 1.1 et seq.

Food and Drug Administration, see 21 CFR 25.1 et seq.

Housing and Urban Development, see 24 CFR 58.1 et seq.

Interstate Commerce Commission, see 49 CFR 1108.1 et seq.

Law Enforcement Assistance Administration, see 28 CFR 19.1 et seq.

National Aeronautics and Space Administration, see 14 CFR 1204.200 et seq.

National Highway Traffic Safety Administration, see 49 CFR 520.1 et seq.

National Marine Fisheries Services, see 50 CFR 251.1 et seq.

Navy Department, see 32 CFR 775.1 et seq.

Nuclear Regulatory Commission, see 10 CFR 2.1 et seq., 51.1 et seq.

Occupational Safety and Health Administration, see 29 CFR 1999.1 et seq.

Office of Education, see 45 CFR 100a.185, 100b.185.

Soil Conservation Service, see 7 CFR 650.1 et seq.

Tennessee Valley Authority, see 18 CFR 305.1 et seq.

Urban Mass Transportation Administration, see 49 CFR 613.100 et seq.

Law Review Commentaries

Comment, on shore oil and gas leasing on public lands: At what point does NEPA require the preparation of an environmental impact statement? 25 San Diego L.Rev. 161 (1988).

Environmental review of recombinant DNA experiments under NEPA: *Foundation on Economic Trends v. Heckler*. Note, 21 U.S.F.L.Rev. 501 (1987).

RCRA immunity from NEPA: The EPA has exceeded the scope of its authority. Comment, 24 San Diego L.Rev. 1249 (1987).

United States Supreme Court

Agency decisions, review, see Strycker's Bay Neighborhood Council, Inc. v. Karlen, N.Y., 1980, 100 S.Ct. 497, 444 U.S. 223, 62 L.Ed.2d 433.

Construction with other laws, see Weinberger v. Catholic Action of Hawaii/Peace Ed. Project, 1981, 102 S.Ct. 197, 454 U.S. 139, 70 L.Ed.2d 298.

Important ingredient of environmental impact statement is discussion of steps that could be taken to mitigate adverse environmental consequences, see Robertson v. Methow Valley Citizens Council, 1989, 109 S.Ct. 1835.

Judicial review of agency actions, duties and functions of court, see Aberdeen & Rockfish Ry. Co. v. Students Challenging Regulatory Agency Procedures, 1972, 93 S.Ct. 1, 409 U.S. 1207, 34 L.Ed.2d 21.

§4333. Conformity of administrative procedures to national environmental policy [NEPA §103]

All agencies of the Federal Government shall review their present statutory authority, administrative regulations, and current policies and procedures for the purpose of determining whether there are any deficiencies or inconsistencies therein which prohibit full compliance with the purposes and provisions of this chapter and shall propose to the President not later than July 1, 1971, such measures as may be necessary to bring their authority and policies into conformity with the intent, purposes, and procedures set forth set forth in this chapter.

(Jan. 1, 1970, Pub.L. 91-190, Title I, §103, 83 Stat. 854.)

Federal Practice and Procedure

Environmental class actions, see Wright, Miller & Kane: Civil 2d §1782.

§4334. Other statutory obligations of agencies [NEPA §104]

Nothing in section 4332 or 4333 of this title shall in any way affect the specific statutory obligations of any Federal agency (1) to comply with criteria or standards of environmental quality, (2) to coordinate or consult with any other Federal or State agency, or (3) to act, or refrain from acting contingent upon the recommendations or certification of any other Federal or State agency.

(Jan. 1, 1970, Pub.L. 91-190, Title I, §104, 83 Stat. 854.)

Federal Practice and Procedure

Environmental class actions, see Wright, Miller & Kane: Civil 2nd §1782.

West's Federal Practice Manual

Quotas for minority businesses, see §16555.

Code of Federal Regulations

Department of Defense, environmental effects, see 32 CFR 214.1 et seq.

§4335. Efforts supplemental to existing authorizations [NEPA §105]

The policies and goals set forth in this chapter are supplementary to those set forth in existing authorizations of Federal agencies.

(Jan. 1, 1970, Pub.L. 91-190, Title 1, §105, 83 Stat. 854.)

Federal Practice and Procedure

Environmental class actions, see, Wright, Miller & Kane: Civil 2d §1782.

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No. 91-125

In the Supreme Court of the United States

OCTOBER TERM, 1991

FRANK ACIERNO, PETITIONER

v.

SAMUEL K. SKINNER,
SECRETARY OF TRANSPORTATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

The petition for a writ of certiorari seeks review of an order of the United States Court of Appeals for the Third Circuit (Pet. App. A3-A4) summarily affirming the district court's dismissal of this action. Petitioner contends that the district court erred in (1) dismissing two counts of his complaint on grounds of laches and (2) restricting the scope of discovery.

The district court fully set forth the factual and legal considerations relevant to its laches determination and decided the issue correctly. Pet. App. A12-A19. We rely on the court's explication of that holding.

With respect to petitioner's contentions (Pet. 10-12) regarding discovery, the district court rulings

that petitioner challenges are not reproduced in the appendix to the petition; nor are they adequately described in the petition. We therefore have reproduced the pertinent rulings in the appendices hereto.

Petitioner contends (Pet. 11) that the district court improperly granted summary judgment "on the merits" of his complaint without affording him sufficient opportunity to conduct discovery on the merits. That contention is incorrect. The court dismissed the complaint based on issues that were fully briefed and argued following adequate opportunity for discovery.

1. Petitioner filed this suit in March 1990 to challenge a federally funded highway project in Delaware, part of which took a portion of petitioner's land. Petitioner's complaint, filed in the United States District Court for the District of Delaware, alleged that the state or federal respondents, or both, had violated the Federal-Aid Highway Act of 1966, 23 U.S.C. 138 (Count 1) [hereinafter, the "Section 4(f) claim"]; the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4331(C) (Count 2); the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. 4651 (Count 3); petitioner's rights under the Fifth Amendment and under 42 U.S.C. 1981 (Count 4); and various state environmental statutes (Count 5). Reproduced Record (R.R.) 163a-179a.

In May 1990, the federal and state respondents filed dispositive motions. The federal respondents moved for summary judgment in their favor on the ground that petitioner's entire suit was barred by laches. R.R. 247a. As to Count 1, the Section 4(f) claim, they sought summary judgment on the additional ground that the undisputed facts established compliance with Section 4(f). The federal respond-

ents also moved to dismiss Counts 3 through 5, among other reasons, for failure to state a claim and lack of subject matter jurisdiction. R.R. 249a-250a. The state respondents likewise moved for summary judgment based on laches and on count-specific grounds. District Court Clerk's Record (C.R.) 39-40.

Judge James Latchum, the district court judge initially assigned to this case, issued a scheduling order in conjunction with the filing of respondents' motions. Judge Latchum's order set a date for argument on the motions and authorized "discovery related to the motions to be argued." R.R. 226a.

Shortly thereafter, petitioner filed a motion for recusal of Judge Latchum. On May 21, 1990, Judge Latchum issued an order and opinion recusing himself pursuant to 28 U.S.C. 455(a). C.R. 36; App., *infra*, 1a-6a. In a memorandum to Chief Judge Joseph Longobardi, Judge Latchum noted that petitioner had also requested that the case be assigned to a judge from outside the district, a request over which Judge Latchum had no authority. App., *infra*, 7a. The case was reassigned to Chief Judge Longobardi. C.R. 37; App., *infra*, 8a.

2. At a status conference on May 29, 1990, Chief Judge Longobardi denied petitioner's request that the case be referred to the Chief Judge of the Court of Appeals for reassignment to a judge from outside the district. R.R. 406a-409a. Petitioner made no further effort to have the case heard by a different judge. Judge Longobardi also adopted Judge Latchum's prior order permitting discovery only on the issues raised in respondents' pending motions. R.R. 434a-436a; App., *infra*, 10a-12a. In response to petitioner's claim that the prior order was unduly restrictive, Judge Longobardi made clear that he would

consider that claim "very closely" if it were submitted in writing and supported by affidavit, as provided in Fed. R. Civ. P. 56. R.R. 434a; App., *infra*, 10a. Petitioner did not pursue the court's invitation to file a written request for modification of the discovery order.

At a hearing on petitioner's application for a temporary restraining order in June 1990, Judge Longobardi reiterated his willingness to allow petitioner adequate discovery to respond to the pending motions and to enlarge Judge Latchum's prior order if petitioner requested it:

> With regard to the scope of discovery, discovery is limited to dealing with the issues raised by the parties. Obviously, briefing on the issue is designed to bring to the Court all of the information available by the plaintiffs [*sic*] which might be pertinent in response to the defendants' motions. Discovery after that time would serve no useful purpose either to the Court or to the plaintiffs.
>
> Under these circumstances, the discovery will be cut off sometime prior to the filing of the brief on June 11.
>
> *However, upon request of the plaintiffs, the Court would give them additional time to conduct discovery and thereby move the oral argument date from June 20 to some later time.*

C.R. 52, at 14; Supp. R.R. 32 (emphasis added); App., *infra*, 15a. Subsequent to that ruling, Judge Longobardi again declared that he would have willingly expanded discovery if petitioner had asked. Pet. App. A28 (the court "was perfectly willing to allow [petitioner] additional time in which to conduct discovery on all of the issues raised in [respondents'] motions").

In light of the proceedings below, petitioner's present contention (Pet. 11) that he was denied adequate discovery is unpersuasive. Petitioner was given repeated opportunities to expand the scope of the original discovery order, but he failed to avail himself of those opportunities.

3. Petitioner errs in asserting (Pet. 11) that the court's ruling on respondents' motions "expanded * * * beyond the limited scope of discovery and issues * * * established [by the court]." As discussed above, the discovery order expressly permitted discovery on all issues raised in the motions. Furthermore, the decision dismissing petitioner's complaint was based solely on the grounds set forth in the motions.

The court granted summary judgment on Counts 1 and 2—the Section 4(f) and NEPA claims—on grounds of laches. Pet. App. A12-A19, A30. As an alternative basis for granting summary judgment on Count 1, the court ruled in favor of respondents on the merits. *Id.* at A19-A25. In dismissing Count 3, the claim based on the Uniform Relocation Assistance and Real Property Acquisition Policies Act, the court agreed with respondents' argument that the statute does not create a private cause of action. *Id.* at A25-A26. The court likewise adopted respondents' position in holding that Count 4—alleging violations of due process and equal protection by the federal respondents and a violation of 42 U.S.C. 1981 by the state respondents—failed to state a claim against any of the respondents and therefore had to be dismissed under Fed. R. Civ. P. 12(b)(6). Pet. App. A26-28, A32-A35. Having dismissed all of the federal claims, the court declined to exercise pendent jurisdiction over, and accordingly dismissed, the state-law claims in Count 5. *Id.* at A29.

Thus, contrary to petitioner's assertion (Pet. 11), the court did not adopt an "expanded theory" in dismissing the complaint. Nor were "all of petitioner's environmental claims" dismissed "on the merits," as petitioner asserts (*ibid.*). The court addressed the merits only as an alternative basis for dismissing petitioner's Section 4(f) claim in Count 1. That determination did not "expand" the issues previously framed in the case, since the federal respondents had sought summary judgment on the merits of Count 1. See C.R. 38, at 16-19. In any event, the court properly based its review of the Section 4(f) claim on the administrative record, which was made part of the record in the district court. See *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 402 U.S. 401, 420 (1971).

4. Finally, there is no merit to petitioner's assertion (Pet. 11-12) that the court improperly " 'conver[ted]' * * * respondent's motions under Fed. R. Civ. P. Rule 12(b)(6) into motions for summary judgment." Notwithstanding the breadth of that assertion, the court treated respondents' Rule 12(b)(6) motions as motions for summary judgment in only one instance. The Court granted summary judgment in favor of the federal respondents on Count 4 (alleging constitutional violations) as an alternative disposition to its primary holding that Count 4 failed to state a claim. Pet. App. A34-A35. That alternative disposition was entirely proper. Petitioner presented no evidence or allegations to support his claim under Count 4, and he failed to rebut in any way an affidavit (C.R. 38, Exh. 3; Supp. R.R. 9-11) submitted by the federal respondents on the issue. Because respondents' Rule 12(b)(6) motion thus presented "matters outside the pleading" with respect

to Count 4, it was proper for the court to treat the motion as it did. See, *e.g.*, *Tuley* v. *Heyd*, 482 F.2d 590, 592-593 (5th Cir. 1973).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

SEPTEMBER 1991

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Civil Action No. 90-150-JLL

FRANK E. ACIERNO, individually
and as Trustee ad litem for
Residents and Tenants, PLAINTIFF

v.

SAMUEL SKINNER, individually and in his capacity as Secretary, U.S. Department of Transportation, JOHN DAVIS, individually, and in his capacity as Director of the Highway Division, Delaware Department of Transportation; MANUEL MARKS, individually and in his capacity as Division Administrator, Federal Highway Administration; THOMAS D. LARSON, individually and in his capacity as Federal Highway Administrator; RONALD C. CARMICHAEL, individually and as delegee, Federal Highway Administrator, DEFENDANTS

and

ALBERT H. MARTA, DEFENDANT-INTERVENOR

MEMORANDUM OPINION

Wilmington, Delaware

May 21, 1990.

LATCHUM, Senior District Judge.

This action is a broad based challenge to the completion of construction of relocated Delaware Route 7 connecting Route 13 to I-95. The planning and steps taken toward the three-phase construction of the new highway had its beginnings at least as early as 1985. Some portions of the highway have been completed. Plaintiff's complaint, which seeks to enjoin construction of a portion of Route 7, was filed on March 29, 1990. (Docket Item ["D.I."] 1.) At the same time plaintiff moved for a temporary restraining order ("TRO"). (D.I. 4.) Because the undersigned was acting as "Duty Judge" for this Court during the week of March 26, 1990, the case was assigned to that judge. Local Rule 2.2(C)(1). On the representation of plaintiff's attorneys that all other parties had been notified, the undersigned judge held a TRO hearing on March 29, 1990, and denied that motion. (*See* D.I. 8.) Before the time for defendants to appear and file answers, plaintiff again moved for a preliminary injunction and leave to take depositions. (D.I. 13 & 14.) Because of the need to expedite these proceedings and to resolve promptly obvious problems with the then posture of the pleadings, the Court on April 19, 1990, scheduled a Rule 16 Scheduling conference for May 7, 1990. (D.I. 16.)

As a result of discussions and comments of counsel at that conference, the Court entered a Preliminary Rule 16 Scheduling Order on May 7, 1990. (D.I. 21.) That order, in substance, (a) permitted the intervention of Albert H. Marta as a defendant; (b) set an expedited schedule for defendants to file answers, motions and an administrative record; (c) established a briefing schedule on all motions; and (d) set oral

argument thereon at 10:00 a.m., June 20, 1990. (*Id.*).

On May 17, 1990, plaintiff filed a motion to recuse the undersigned judge from presiding over any further proceedings in this case on the grounds that: (1) the undersigned judge had previously represented the Delaware State Highway Department before his appointment to the bench; (2) that the undersigned judge, before assuming the bench, had advocated, in other matters on behalf of the Delaware Highway Department, the same position as defendants advocate here; and (3) that the undersigned judge because of his earlier representation of the Delaware Highway Department and his relationship to counsel has a personal bias of the present matter because he did not reveal that he had once represented the Delaware Highway Department before the scheduling conference. (D.I. 34 & Ex. at 22-23.)

It is correct that the undersigned judge was appointed attorney for the Delaware Highway Department for New Castle County in 1948 and served as such until 1950. He also served as attorney for the Delaware Interstate Highway Division from August 17, 1955 to February 6, 1963, and as attorney for the Delaware River and Bay Authority from February 6, 1963 to August 21, 1968. All of this is public information, which appears and has appeared for many years in biographical sketches of the undersigned judge.[1]

However, this judge has no recollection that he has ever met defendant John Davis or ever had any dealings with him in any capacity or any other defendant

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[1] *See, e.g.*, Who's Who in America; Who's Who in the East; Almanac of the Federal Judiciary; Judicial Staff Directory; Who's Who in American Law; Judges of the United States.

named in this action. Furthermore, the Court has never, prior to this suit, met or had any dealings with the plaintiff in this action.

Of course, this judge personally knows plaintiff's and defendants' attorneys because all of them have appeared before him as a judge in other matters. This judge has no recollection of retaining Aubrey B. Lank, Esq., as a special counsel before assuming the bench in any matter involving the Delaware State Highway Department, and has no recollection of advocating on behalf of the Delaware Highway Department the same defense as defendants are advocating here. All of this, if it ever occurred, was more than twenty-one years ago. But be that as it may, the present motion to recuse under 28 U.S.C. § 455(a) requires a judge to voluntarily disqualify himself "in any proceeding in which his impartiality might reasonably be questioned."

Most authorities which have considered the issue have held that even if no bias or prejudice of a judge may actually exist, it is enough to disqualify him if there be the mere appearance of some partiality. Limeco, Inc. v. The Division of Lime, 571 F.Supp. 710, 711 (N.D.Miss. 1983). Thus, to say that one has no recollection of any bias, and subjectively believes there is none, does not justify refusing voluntary disqualification. Accordingly, to eliminate any possible question of the appearance of partiality, the plaintiff's motion to recuse will be granted.

The undersigned stands recused and will request that this case be assigned to another judge who will be required, depending on the new judge's court schedule, to either go forward with, or reset the date for, oral argument on the motions now being briefed.

An Order in conformance with this Memorandum Opinion will be entered.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
– FOR THE DISTRICT OF DELAWARE

Civil Action No. 90-150-JLL

FRANK E. ACIERNO, individually
and as Trustee ad litem for
Residents and Tenants, PLAINTIFF

v.

SAMUEL SKINNER, individually and in his capacity as Secretary, U.S. Department of Transportation, JOHN DAVIS, individually, and in his capacity as Director of the Highway Division, Delaware Department of Transportation; MANUEL MARKS, individually and in his capacity as Division Administrator, Federal Highway Administration; THOMAS D. LARSON, individually and in his capacity as Federal Highway Administrator; RONALD C. CARMICHAEL, individually and as delegee, Federal Highway Administrator, DEFENDANTS

and

ALBERT H. MARTA, DEFENDANT-INTERVENOR

ORDER

For the reasons stated in the Court's Memorandum Opinion entered in this case on this date, it is

ORDERED that plaintiff's recusal motion is hereby granted and the undersigned stands recused and will request this case be assigned to another judge.

Dated: May 21, 1990.

/s/ James L. Latchum
United States District Judge

APPENDIX C

MEMORANDUM DATE: May 21, 1990

TO: Chief Judge Longobardi

FROM: Judge Latchum

RE: Acierno v. Skinner et al., C.A. No. 90-150-JLL

I enclose a Memorandum Opinion and Order entered today in the above case in which, upon plaintiff's motion, I have recused myself from further proceedings in this matter. Therefore, I request that the case be assigned to another judge.

I point out that plaintiff's recusal motion also requests the assignment of another judge from outside this district—a request over which I have no authority.

In addition, I call your attention to the fact that this case is moving on an expedited track at plaintiff's urging. The parties are in the midst of briefing several outstanding motions including plaintiff's motion for a preliminary injunction. There is an outstanding Rule 16 Scheduling Order setting oral argument on all motions to be heard on *June 20, 1990, at 10 a.m.* When the case is assigned to a new judge, a determination will have to be made by the new judge whether the scheduled oral argument shall proceed on that date and that, of course, will depend on the new judge's existing calendar schedule.

md.

cc: Stephen B. Potter, Esq.
Kent A. Jordan, Esq.
Frederick H. Schranck, Esq.
Stephen E. Herrmann, Esq.
J. R. McAllister, Jr., Clerk

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Civil Action No. 90-150 LON*

FRANK E. ACIERNO

v.

SAMUEL SKINNER
JOHN DAVIS
MANUEL MARKS
THOMAS D. LARSON
RONALD C. CARMICHAEL

NOTICE OF REASSIGNMENT OF JUDGE

Please note that the above case has been reassigned from Judge Latchum to Judge Longobardi.

/s/ J. R. McAllister, Jr.
Clerk

Date: May 25, 1990

To: The Honorable Joseph J. Longobardi
The Honorable James L. Latchum
Stephen B. Potter, Esq.
Kent A. Jordan, Esq.
Frederick H. Schranck, Esq.
E. Norman Veasey, Esq.
Statistical clerk

---

* When filing papers, please include the initials of the Judge assigned to the case.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE DISTRICT OF DELAWARE

Civil Action No. 90-150 (JLL)

FRANK E. ACIERNO, Individually and as Trustee ad litem for Residents and Tenants, PLAINTIFF

v.

SAMUEL SKINNER, Individually and in his capacity as Secretary, U.S. Department of Transportation; JOHN DAVIS, Individually and in his capacity as Director of the Highway Division, Delaware Department of Transportation; MANUEL MARKS, Individually and in his capacity as Division Administrator, Federal Highway Administration; THOMAS D. LARSON, Individually and in his capacity as Federal Highway Administrator; RONALD C. CARMICHAEL, Individually and as Delegee, Federal Highway Administrator, DEFENDANTS

Wilmington, Delaware
Tuesday, May 29, 1990
2:15 o'clock, p.m.

Before: HONORABLE JOSEPH J. LONGOBARDI, Chief Judge

Appearances:

POTTER, SPILLER, CROSSE & LEONARD
By: STEPHEN B. POTTER, ESQ.

-and-

SUGARMAN & ASSOCIATES,
By: ROBERT J. SUGARMAN, ESQ.
(Philadelphia, Pennsylvania)
Counsel for Plaintiff

FREDERICK H. SCHRANCK, ESQ.
Delaware Department of Transportation
Counsel for Defendant Davis

KENT A. JORDAN, ESQ.,
Assistant United States Attorney
Counsel for Federal Defendants

Also Present:

RICHARDS, LAYTON & FINGER
By: STEPHEN E. HERRMANN, ESQ.
For Intervenor/Defendant Albert Marta

* * * * *

[40] I want to deal now with the business about discovery.

You are under the impression that you were limited in your discovery. Apparently the order doesn't do that.

MR. SUGARMAN: The discovery limits me to the laches issue and to the other defendant motions to be argued on June the 20th. I specifically asked Judge Latchum to permit me to have discovery with regard to the merits, and he specifically refused it.

THE COURT: Do you want some discovery on the laches and other motions?

MR. SUGARMAN: Yes, your Honor.

THE COURT: Certainly there is a motion for [41] summary judgment. If you make a representation to me that you need discovery to counter that motion, I think I would be obliged to look at it very closely.

MR. SUGARMAN: Your Honor, I would like to again call to the Court's attention that the defense of laches is to be weighed among all of the merits of the case.

THE COURT: I understand that.

MR. SUGARMAN: It can't be decided as a single issue.

THE COURT: I am not going to decide that in this case now today. I am not going to decide that.

MR. SUGARMAN: My only point as to discovery, in order for the laches issue to be disposed of properly, the entire merits of the case have to be heard because laches cannot be disposed of in isolation from the merits of the case.

In order for the merits of the case to be disposed of, I have to have discovery on the merits of the case. Therefore, since the presumption that Judge Latchum started with is wrong, namely that laches can be disposed of independently of the other issues in the case, it is inappropriate to deny discovery on all of the other issues in the case in order to resolve the laches issue.

Therefore, I do renew my request which I made to Judge Latchum for discovery on the merits.

[42] MR. HERRMANN: Your Honor, two points.

One, to the extent the response is due June the 11th, there is appropriate Rule 56 affidavits. With regard to the necessity for more discovery, to the extent it hasn't already been allowed, and then I'm sure your Honor would consider that.

The other point, really, your Honor, is that counsel is just wrong. There are numerous cases which we cite endlessly in our brief where the courts have ruled on the issue of laches as a preliminary matter. That's exactly what all our briefs have relied on.

THE COURT: When you talk about laches, you're really talking about one very narrow issue, as I recall, and that is prior knowledge?

MR. JORDAN: And undue prejudice.

THE COURT: Undue prejudice?

MR. JORDAN: Yes, your Honor.

THE COURT: With regard to those two issues, I would allow discovery, assuming that appropriate Rule 56 affidavit is filed. I see no reason to go beyond that, if that's the narrow scope of your laches issue.

MR. SUGARMAN: If I understand your Honor's ruling, and maybe your Honor didn't intend it, your Honor is narrowing the discovery that Judge Latchum allowed. He allowed us discovery on the laches issue without filing an [43] affidavit under Rule 56(e).

MR. HERRMANN: The only reason I mentioned the Rule 56(e) affidavit, your Honor, is only to the extent that Mr. Sugarman somehow wishes to present further in his brief the necessity for merits discovery in order to resolve what we think is a limited issue.

THE COURT: If he wants to have discovery with regard to the summary judgment motion, I will allow it. He has got to follow the rules like everybody else does.

And the discovery is limited to the very narrow scope of your laches issue, those two items that you just described. And the decision will be made on those two very narrow issues and nothing else, because I am limiting his discovery.

* * * * *

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE DISTRICT OF DELAWARE

Civil Action No. 90-150 LON

FRANK E. ACIERNO, INDIVIDUALLY AND AS TRUSTEE AD LITEM FOR RESIDENTS AND TENANTS, PLAINTIFF

v.

SAMUEL SKINNER, Individually and in his capacity as Secretary, U.S. Department of Transportation; JOHN DAVIS, Individually and in his capacity as Director of the Highway Division, Delaware Department of Transportation; MANUEL MARKS, Individually and in his capacity as Division Administrator, Federal Highway Administration; THOMAS D. LARSON, Individually and in his capacity as Federal Highway Administrator; RONALD C. CARMICHAEL, Individually and as Delegee, Federal Highway Administrator, DEFENDANTS

Wilmington, Delaware
Monday, June 4, 1990
10:30 o'clock a.m.

Before: HONORABLE JOSEPH J. LONGOBARDI, Chief Judge

---

[2] Appearances:

STEPHEN B. POTTER, ESQ., and
PAUL PTAK, ESQ.
Potter, Spiller, Crosse & Leonard

-and-

ROBERT J. SUGARMAN, ESQ., and
JAMES NEILL, ESQ.
(Philadelphia, PA)
Counsel for Plaintiff

KENT A. JORDAN, ESQ.
Assistant United States Attorney

-and-

JAMES SCOUTEN, ESQ.
Office of Regional Counsel
Federal Highway Administration
(Baltimore, MD)
Counsel for Federal Defendants

FREDERICK H. SCHRANCK, ESQ.
Delaware Department of Transportation
Counsel for State Defendants

STEPHEN E. HERRMANN, ESQ.
Richards, Layton & Finger
Counsel for Defendant-Intervenor

* * * * *

[14] THE COURT: Okay. With regard to any misunderstanding about what is going to happen on June 20th, there will be an oral argument on the motions by the defendants. It will not be a hearing. It will be oral argument.

With regard to the scope of discovery, discovery is limited to dealing with the issues raised by the parties. Obviously, briefing on the issue is designed to bring to the Court all of the information available by the plaintiffs which might be pertinent in response to the defendants' motions. Discovery after that time would serve no useful purpose either to the Court or to the plaintiffs.

Under these circumstances, the discovery will be cut off sometime prior to the filing of the brief on June 11.

However, upon request of the plaintiffs, the Court would give them additional time to conduct discovery and thereby move the oral argument date from June 20 to some later time.

* * * * *

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